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In the Supreme Court of the United States

October Term, 1978

No. . . . 78-1066

AMERICAN INDUSTRIES CORP.,
Petitioner

v.

SHARON STEEL CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDICES

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDICES

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, American Industries Corp., respectfully prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Third Circuit filed in this proceeding on November 1, 1978, affirming the judgment of the United States District Court for the Western District of Pennsylvania.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (hereinafter "Third Circuit"), which was designated "not for publication", is reprinted in the Appen-

dices attached to this petition (A. 1a-5a). The United States District Court for the Western District of Pennsylvania wrote no opinion in denying petitioner's Motion for New Trial and Motion to Alter or Amend the Judgment. The orders of the District Court entering judgment and denying petitioner's Motion For New Trial and Motion to Alter or Amend the Judgment are included in the Appendices (A. 9a-13a).

JURISDICTION

The opinion and order of the Third Circuit were filed on November 1, 1978 (A. 1a). A timely petition for rehearing *en banc* was denied by the Third Circuit on November 28, 1978 (A. 7a), and this petition for certiorari is filed within ninety days of that date. On December 14, 1978, the Third Circuit granted petitioner's motion to stay issuance of its mandate until January 4, 1979 (A. 8a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the trial court's instructions on the issues presented under Section 1 of the Sherman Act, 15 U.S.C. §1, were fundamentally inadequate and erroneous and contrary to the decisions of this Court and to the mandate of Congress as embodied in Section 1 of the Sherman Act?

2. Whether the trial court's charge to the jury was adequate under the standards of Federal Rule of Civil Procedure 49(a), the decisions of this Court and the United States Courts of Appeals, fundamental fairness and due process of law?

3. Whether a post-charge exception to the instructions to the jury based on pre-charge manifestations of objections, as embodied in pretrial memoranda of law, requests for instructions, and pre-charge arguments in conference between the trial court and counsel for both parties, properly preserved petitioner's rights where the trial court was fully aware of the objections and their bases, and both parties and the trial court acquiesced in the procedure?

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, Federal Rule of Civil Procedure 49(a), and Federal Rule of Civil Procedure 51 are relevant to the issues raised in this case. They are, however, lengthy and have therefore been set forth in the Appendices attached to this petition (A. 39a-41a).

STATEMENT OF THE CASE

On November 18, 1974, at Civil Action No. 74-1122, American Industries Corp. (hereinafter "AMI" or "petitioner") initiated this action against Sharon Steel Corporation (hereinafter "Sharon" or "respondent").

This action arises out of negotiations and contracts for the delivery of steel entered into by the parties for the years 1973 and 1974 (and the first quarter of 1975) and Sharon's failure to deliver that steel in a time when extreme scarcity existed in the steel market and alternate sources of supply were unavailable.

AMI brought a diversity suit in the United States District Court for the Western District of Pennsylvania against Sharon, alleging breach of the contracts for 1973 and 1974 and tortious interference with petitioner's business relation-

ships. AMI also sought treble damages for an alleged violation by Sharon of Section 1 of the Sherman Act, 15 U.S.C. §1. Sharon counterclaimed against AMI for an alleged breach of contract for 1974.

Trial commenced on November 30, 1977, before the Honorable Herbert P. Sorg and a jury and continued, uninterrupted, through December 22, 1977. The trial proceedings are covered in over 2,000 pages of transcript, which includes the testimony of 18 witnesses and the admission of over 200 exhibits. As is appropriate in a complex case of such magnitude, the trial court instructed the parties to submit, prior to trial, requests for charge and proposed Special Interrogatories. In the week before trial, AMI submitted over 100 requests for charge and Sharon 84, both with appropriate legal citations. Despite this procedure, the trial court never wrote out the charge prior to the time it was given (Tr. 100, In Chambers Proceedings, December 22, 1977, 2:20 p.m.).

On December 21, 1977, after testimony was concluded, counsel met with the trial court in the afternoon and, after an interruption of several hours, through the evening to develop Special Interrogatories to be submitted to the jury. Counsel for both parties made extensive legal arguments based on their trial memoranda and requests for charge. This discussion was briefly continued on Thursday morning, December 22, 1977. At the close of these sessions, the trial court generally denied the requested instructions (Tr. 86, In Chambers Proceedings, December 22, 1977, 9:40 a.m.). Counsel then made their closing arguments, lasting a total of approximately three hours. At no time prior to the charge to the jury did the trial court inform counsel of the contents of the charge.

In the early afternoon of December 22, 1977, the trial court charged the jury for some 45 minutes and submitted to it 22 Special Interrogatories. After another hour's session in chambers, the trial court briefly reinstructed the jury as to Sharon's theory of the case, duplication of damages, and mitigation of damages (A. 34a-35a). The jury was sent out to deliberate sometime between 3:30 and 4:00 p.m. At 11:00 p.m., on December 22, 1977, the jury returned and awarded respondent $1,168,710 in damages on its counterclaim.

Judgment for Sharon was entered on the verdict as embodied in answers to Special Interrogatories, on December 30, 1977 (A. 10a-13a).

On January 3, 1978, AMI filed a Motion for New Trial and a Motion to Alter or Amend the Judgment. On May 10, 1978, the trial court denied AMI's post-trial motions (A. 9a).

On May 10, 1978, AMI filed a Notice of Appeal with the Clerk of the United States District Court for the Western District of Pennsylvania in order to effectuate its appeal from the judgment entered on December 30, 1977, and from all adverse orders and rulings in this action, including but not limited to the denial of AMI's Motion for New Trial and Motion to Alter or Amend the Judgment.

On November 1, 1978, after submission of briefs and oral argument, the judgment of the District Court was affirmed by the Third Circuit, which held that the trial court's charge was consistent with the purposes of Fed. R.Civ.P. 49(a) in simplifying jury instructions when interrogatories are submitted to the jury, that AMI had waived certain of its objections to the charge, and that the trial court's charge was not so inadequate as to constitute fundamental error (A. 1a-5a).

REASONS FOR GRANTING THE WRIT

I. THE TRIAL COURT'S INSTRUCTIONS ON THE ANTITRUST ISSUES WERE FUNDAMENTALLY INADEQUATE AND ERRONEOUS AND CONTRARY TO THE DECISIONS OF THIS COURT AND TO THE MANDATE OF CONGRESS AS EMBODIED IN SECTION 1 OF THE SHERMAN ACT.

At the close of a lengthy trial involving complex and conflicting legal and factual presentations, it is respectfully submitted that the instructions to the jury were incomplete, insufficiently detailed, confusing, erroneous and misleading so as to require reversal herein. The charge, which lasted 45 minutes, filled 33 pages of transcript and was extemporaneously given, was a superficial and fatally inadequate presentation of complex issues. Indeed, the trial court itself later doubted the adequacy of the charge.[1]

> "THE COURT: I don't think a Court should ever give instructions to the jury without having them written up and reading them verbatim, but I just didn't have time with this one, that's all. I am not proud of it, but I hope it is covered, the issues are covered, that's all." (Tr. 100, In Chambers Proceedings, December 22, 1977, 2:20 p.m.)

The inadequacy in the charge was particularly evident with respect to the antitrust issues.

Petitioner presented extensive evidence at trial as to the anti-competitive behavior of Sharon, i.e., that Sharon in concert with a corporate subsidiary, intended and acted to eliminate AMI as a competitor by cutting off its supply of steel in a market characterized by extreme scarcity, attempted to cut AMI out of markets and engaged in other bad faith and anti-competitive behavior (Trial Tr. 939-40, 1452, 1454-5, 1497-9, 1686-7, 1733-4, 1795-6, 1814-5, 1867-9, 1904-6, 1907).

Judicial analysis since the decisions of this Court in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) and *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918),[2] has pointed out the number and variety of complex issues in rule of reason cases under Section 1 of the Sherman Act, 15 U.S.C. §1. Accordingly, it is necessary that a trial court charge the jury in such a case on each of the complex issues which are raised. In this case a perusal of the trial court's charge on the antitrust aspect of the case will demonstrate that it was completely inadequate; that the trial court did not charge the jury on each of the antitrust issues. (A. 29a-33a). Further, it is respectfully submitted that the trial court wrongfully emphasized monopoly in its antitrust instructions and charged, in effect, that a restraint of trade under Section 1 of the Sherman Act must be a monopoly, thereby setting such an erroneous and unattainable standard that it was impossible for the jury to find that a Section 1 violation was proven. In this regard, the trial court initially stated in its charge, in relevant part:

> "Congress, in its wisdom, years ago, has determined that in a free enterprise system, either competition or regulation are necessary for the public's protection."
>
> Should anyone acquire a *monopoly*, for instance, especially of a basic material, the public could be substantially injured by the amount that it might be required to pay for such material.

[1] The trial court's observation should be read in light of the Ninth Circuit's statement in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 466 (9th Cir. 1964), *cert. denied*, 377 U.S. 993 (1964).

> "Any antitrust case worth trying to jury is worth a carefully drafted set of jury instructions. The instructions should be fairly stated in terms of the contentions of the parties and the factual content of the case."

See also Gainesville Utilities Department v. Florida Power & Light Co., 573 F.2d 292, 294, n. 3 (5th Cir. 1978).

[2] *See Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

The only substitute for competition, in that event, would be regulation, such as there is of public utilities, for instan . Although *monopolies* are granted to public utilities, competition is not protected.

The very term, 'monopoly,' indicates a lack of competition. One party is in control.

But, in such cases *where there is no competition for* the service or commodity, regulations are established to do that which competition in other fields does.

It's of public benefit that the suppliers of products and services should be required to compete, and that such competition would have a tendency to make the materials or services available to the public at the lowest possible price." (Emphasis supplied) (A. 29a)

Section 1 of the Sherman Act does not require that a restraint of trade rise to monopoly level. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 607 (1972); *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1246-8 (3d Cir. 1975); *Antitrust Adviser* §1.52, p. 55 (C. Hills ed., 2d ed. 1978). *Cf., United States v. Grinnell Corp.*, 384 U.S. 563, 570-1 (1966); *United States v. E I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957). Prior to trial, petitioner had decided not to pursue its attempted monopoly cause of action under Section 2 of the Sherman Act, 15 U.S.C. §2. Nevertheless, the trial court, which was required to instruct on the rule of reason, set down standards even stricter than those required in a Section 2 case. *Cf.*, P. Areeda & D. Turner, 3 *Anti-trust Law* §835 (1978). To so instruct the jury is clearly contrary to the statutory criteria of the antitrust laws as mandated by Congress and is reversible error.

When counsel for Sharon pointed out that the trial court failed to read Interrogatory 22[3] to the jury, he further, we respectfully submit, compounded his earlier prejudicial error by giving further instructions using the phrase "unreasonable" several times, but continuing the emphasis on the erroneous standard of monopoly, albeit, as with much of the charge, in a manifestly incomprehensible manner:

"Remembering the purpose of the antitrust laws, that is, to preserve competition, if you should find by a preponderance of the evidence that Sharon and Ohio Metal Processing engaged in a course of conduct or entered into a combination or conspiracy to impose restraint on the free movement of trade, in other words, simply to affect competition, we'll say, *to remove competition to its full extent*, from a relevant market area, and an affirmative to this question is warranted.

But it has to do with a restraint of trade or an interference with competition which is unreasonable.

If there is a combination or a conspiracy and their course of conduct had the effect of unreasonably imposing a restraint upon trade, or the removal of competition from the trade." (Emphasis supplied) (A. 31a)

The trial court committed a fundamental error of law in connection with the foregoing. This error was compounded by the fact that the trial court refused to charge on the *per se* theories advanced by AMI and thereby further prejudiced the proof of a violation of Section 1 of the Sherman Act to the jury.[4] On the whole, the trial court's charge on the antitrust

[3]Interrogatory 22 reads, "Did Sharon enter into a combination or conspiracy with Ohio Metal Processing Company to injure competition and to unreasonably restrain trade or commerce?"

[4]The trial court also refused to charge on circumstantial evidence and non-compartmentalization of evidence, thereby further emasculating plaintiff's antitrust case (Tr. 88-9, 91, In Chambers Proceedings, December 22, 1977, 2:20 p.m.).

issue was so lacking in substance and was so confusing as to be fundamentally erroneous.

AMI asserted that Sharon had violated Section 1 of the Sherman Antitrust Act on three different *per se* theories: a conspiracy to eliminate or injure a competitor by unfair means, *Albert Pick-Barth Co., Inc. v. Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir. 1932), *cert. denied*, 286 U.S. 552 (1932); *C. Albert Sauter Co., Inc. v. Richard S. Sauter Co., Inc.*, 368 F. Supp. 501 (E.D. Pa. 1973); a concerted refusal to deal, *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); and the use of a position of strategic dominance in an industry with respect to a scarce commodity to choke off a competitor. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

Prior to giving its charge the trial court indicated that the jury would be charged only on the rule of reason, although the *per se* theories could be argued to the jury (Tr. 36-7, In Chambers Proceedings, December 21, 1977, 2:10 p.m.).[5] The record in this case clearly supported the propriety of a charge on the three *per se* theories advanced by AMI. (Trial Tr. 939-40, 1452, 1454-5, 1497-9, 1686-7, 1733-4, 1795-6, 1814-5, 1867-9, 1904-7). It is respectfully submitted that the trial court's failure to charge on the issues was clearly prejudicial error.

The Third Circuit did not discuss these errors in its opinion, although the issues were raised by petitioner in its post-trial motions, as well as in its brief to the Third Circuit. These errors of law should be reviewed by this Court to prevent the

[5]The trial court did permit the factual foundation for a *per se* violation under *Albert Pick-Barth Co., Inc. v. Mitchell Woodbury Corp., supra*, to be recited in Special Interrogatory 21 (A. 12a), but refused interrogatories and instructions on the other *per se* theories. This served only to compound the jury's confusion.

application of a clearly incorrect interpretation of the antitrust laws, as well as a deprivation of AMI's fundamental right to a fair trial due to the trial court's fundamentally inadequate and erroneous instructions. AMI's right to present its claim under Section 1 of the Sherman Act was effectively denied by the trial court's failure to charge the jury properly. Moreover, as indicated in recent articles by legal scholars on the subject, the issue of the validity of the *per se* rule under *Albert Pick-Barth Co., Inc. v. Mitchell Woodbury Corp., supra*, is important for this Court to consider. *See, e.g.*, R. S. Venning, "Antitrust and Unfair Competition", "*Litigation*, Spring 1978 at 35; Comment, "A Reexamination of *Pick-Barth* Per Se Illegality Under Section 1 of the Sherman Antitrust Act", 38 *U. Pitt. L. Rev.* 87 (1976).

II. THE THIRD CIRCUIT'S APPROVAL OF THE TRIAL COURT'S CHARGE IS CONTRARY TO THE DECISIONS OF THIS COURT, THE PROVISIONS OF FEDERAL RULE OF CIVIL PROCEDURE 49(a), THE STANDARDS OF FUNDAMENTAL FAIRNESS AND DUE PROCESS, AND IS IN CONFLICT WITH THE DECISIONS OF THE OTHER CIRCUITS.

Pursuant to Fed.R.Civ.P. 49(a), there were twenty-two Special Interrogatories submitted to the jury to assist it in its deliberations. Seventeen of the Special Interrogatories were essentially general verdicts covering the basic issues of liability and damages with regard to AMI's two contract claims, its tort and antitrust claims, and Sharon's contract claim, without any further factual elaboration. For example, Special Interrogatories 1 and 22 show the complex legal and factual determinations implicit in these Special Interrogatories:

"1. Did Sharon breach the agreement for 1973?

"22. Did Sharon enter into a combination or conspiracy with Ohio Metal Processing Company to injure competition and to unreasonably restrain trade or commerce?" (A. 10a, 12a).

Fed.R.Civ. P. 49(a) provides that "the court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue."

At the end of this three-week trial, resulting in the admission of over 200 exhibits, as well as voluminous testimony, the trial court's charge lasted less than an hour, filled only thirty-three pages of transcript, was, we respectfully submit, disorganized, confusing, lacking in substance and clarity, and was fundamentally erroneous as a matter of law (A. 14a-38a). The instructions consisted, in essence, of a reading of the Special Interrogatories together with some extemporaneous comments. Furthermore, counsel was never informed prior to the actual charge to the jury of the contents of that charge.

The lack of clarity was not only evident in the antitrust portion of the charge but also in the instructions in regard to the basic contractual issues. In attempting to describe the very essence of the dispute between the parties in regard to the agreement for 1973, the trial court charged the jury as follows, misstating Sharon's contention[6] and, we respectfully submit, inevitably confounding the jury:

> "AMI is contending that it was entitled to receive under the terms of the agreement for 1973 a minimum monthly amount in each and every month during the period. *Sharon is contending that the cause of its reasons and entering into the agreement, if during the year 1973 quantities of steel were delivered during the period of the contract which when over all the months would present, would present the total amount contracted for, then the agreement will have been complied with.* This is the difference between the parties and it is for you to determine from all of the evidence what the parties agreed to and then also to determine whether or not there was compliance with the agreement of the parties on the part of Sharon in its deliveries during the year 1973. Simply indicate whether your answer to this question is yes or no." (Emphasis supplied.) (A. 17a-18a.)

[6]This was later corrected by the trial court but such correction served, we respectfully submit, only to confuse the jury further (A. 34a-35a).

Such language cannot satisfy the requirements of statutory and decisional law for jury instructions. AMI asserted that the trial court's failure to charge 75 of its requested instructions resulted in a clear error of law. For example, at trial there was extensive evidence of respondent's bad faith behavior in the performance of its contracts with petitioner. Sharon admits that such behavior was at issue in these contracts. Yet, the trial court refused *any* charge in this area, to the extreme prejudice of petitioner. Furthermore, in an antitrust case, where it is often difficult to prove a conspiracy or combination to restrain trade by direct evidence, the trial court refused to give *any* charge on circumstantial evidence.

Sharon has asserted that the trial court's charge was "adequate", primarily because Special Interrogatories were given to the jury, and the Third Circuit has apparently adopted that approach, relying on *Lawrence v. Gulf Oil Corp.*, 375 F.2d 427 (3d Cir. 1967) (A. 3a). We submit that this position is erroneous under the circumstances. The *Lawrence* case dealt with a simple factual situation[7] and, where *elaborate* instructions had been given, held:

[7]*Lawrence v. Gulf Oil Corp., supra,* involved an action for injuries by a seaman for an assault by the boatswain. The only complaint was the trial court's failure to recall the jury and recharge on the burden of proof. The Court noted that elaborate instructions had been given. The interrogato-

(continued)

"When, therefore, the general charge adequately directs the jury to its duties in answering the questions submitted to it there is no need to accompany the submission with repetitive instruction." 375 F.2d at 429.

To apply *Lawrence*, which is correctly decided on its facts, to the circumstances present in the instant case brings the Third Circuit directly into conflict with the approach of other Courts of Appeals, such as the Ninth Circuit.

In *Gough v. Rossmoor Corp.*, 487 F.2d 373 (9th Cir. 1973), *cert. denied*, 429 U.S. 857 (1976), a civil antitrust suit, the trial court coupled an instruction, which was far more clear and complete than any instruction in the instant case, with a Fed.R.Civ.P. 49(a) interrogatory. This Special Interrogatory read, "If your answer to either of the preceding questions is in the affirmative, did such restraint have a substantial effect on interstate commerce or the flow of interstate commerce?" The Court held that this combination was not a sufficient instruction:

> "[T]he jury must be given adequate instructions as to the legal standard to be applied. Ratigan v. New York Central R.R., 291. F.2d 548, 554 (2d Cir. 1961); 5A Moore's Federal Practice, supra ¶49.02, at 2206 n. 7; 9 Wright & Miller, Federal Practice & Procedure, supra, §2506, at 502. The interrogatory submitted to the jury in this case (question '3,' *supra* note 2) did not inform the jury of the constitutional tests for determining whether the relationship between defendants' conduct and interstate commerce was such as to permit Congress to prohibit defendants' conduct. Nor was the general explanatory instruction given to the jury adequate to this purpose." 487 F.2d at 377.[8]

See also, Lind v. Aetna Casualty and Surety Co., 374 F.2d 377, 380-1 (5th Cir. 1967).

The need for special care in instructing a jury in complicated cases is emphasized by recent writings questioning the value of trying complex cases to a jury. Francis R. Kirkham, "Complex Civil Litigation — Have Good Intentions Gone Awry?" 70 F.R.D. 199, 208 (1976); *In re United States Financial Securities Litigation*, 75 F.R.D. 702 (S.D. Calif. 1977) and cases cited therein; *Antitrust Advisor*, § 21.61 at p. 915 (C. Hills ed., 2d ed. 1978). In cases such as the instant one a trial court must use special care to insure that the jury is effectively able to comprehend, and then render a verdict on, the evidence and difficult legal issues involved; otherwise, a party is deprived of its right to a fair trial.

It was error for the Third Circuit to apply *Lawrence v. Gulf Oil Corp., supra*, to the circumstances present here. This approach deprives petitioner of its due process rights to have adequate jury instructions and a fundamentally fair trial. No jury could decide such issues as presented here without adequate guidance from the trial court. A mere

ries involved simple factual questions and obviously did not require detailed instructions.

The interrogatories in *Lawrence* read:

"1. Did Mike Faifua assault James Lawrence on June 15, 1959?

2. If your answer to No. 1 is yes, did Mike Faifua hit James Lawrence with a 'sandbag'?

3. If your answer to No. 1 is yes, was the defendant negligent in failing to provide the plaintiff with a reasonably safe place to work?

4. If your answer to No. 1 is yes, was the defendant's vessel, The Gulf Price, unseaworthy in the respect that Mike Faifua was not of equal disposition to the ordinary man of his calling."

[8]The trial Court in *Gough v. Rossmoor Corp., supra*, had instructed:

> "The Sherman Act applies to parties whose acts are in the course or flow of commerce across state lines or whose acts, although local, substantially affect interstate trade and commerce. By substantial the law means not de minimis—not insignificant, an amount more than trifling. The amount of interstate trade involved, if substantial, is not material, since the Sherman Act brands as illegal the character of the restraint, not the amount of commerce affected." 487 F.2d at 377.

reading of the Special Interrogatories is not sufficient; special care was required in instructing the jury because of the complexity of the factual and legal issues involved. *See e.g., McClendon v. Reynolds Electric and Engineering*, 432 F.2d 320, 232 (5th Cir. 1970). The trial court did not exercise that care, despite over 100 requests for charge from petitioner and 84 from respondent, all of which were submitted well in advance of the charge. The trial court even failed to inform counsel in advance of what would be charged.

The trial court's failure to properly charge on the issues in this case requires the exercise of supervision of this Court. Lack of an adequate charge affects the fundamental fairness of the trial.

> "The idea that a jury should be given guidance in its decisionmaking is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. See Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 498, 75 L.Ed. 1188, 51 S.Ct. 513 (1931); Fed. Rul. Civ. Proc. 51. When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." (Footnote omitted.) *Gregg v. Georgia*, 428 U.S. 153, 192-3 (1976).

Clearly, the jury in this case was neither carefully or adequately guided in its deliberations, and, as a result of which, AMI was deprived of its right to a fair trial.

As pointed out above, the Third Circuit's reliance in the instant case on *Lawrence* is clearly erroneous and in direct conflict with other Courts of Appeals that have ruled in circumstances similar to those present here. It is important for this Court to resolve that conflict in order that a suitable standard for the handling of this aspect of complex cases can be established to assure the effectuation of the right to a fair trial.

III. THERE IS A CONFLICT IN THE CIRCUITS AS TO WHETHER PETITIONER'S EXCEPTION TO THE CHARGE, BASED ON PRE-CHARGE OBJECTIONS TO THE SUBSTANCE OF THE CHARGE, AS WELL AS PRETRIAL MEMORANDA OF LAW AND REQUESTS FOR INSTRUCTIONS, CONSTITUTES A WAIVER OF ITS OBJECTIONS TO THE CHARGE.

There is a conflict between the Third Circuit's decision that Petitioner waived certain objections to the trial court's charge under Fed.R.Civ.P. 51 and the decisions of other United States Courts of Appeals.

After the charge to the jury, at the beginning of the in-chambers proceedings, counsel for Sharon made a proposal:

> "MR. WENTLEY: As usual, I have a proposal that probably won't fly.
> But I was going to suggest, Your Honor, that in view of the nature of the special interrogatories, and in view of the Court's previous statements, that it will be reviewing the legal questions, I would think that if both the plaintiff and the defendant were granted exceptions to those points previously submitted in writing, which was not covered in the charge, that that can be all reviewed at a later time and everybody protected, as would the Court.
> There may be something wrong with the idea, but I can't think of it." (Tr. 85, In Chambers Proceeding, December 22, 1977, 2:20 p.m.)

Despite this suggestion, initially the Court and counsel for AMI attempted to comply strictly with the requirements of Fed. R.Civ.P. 51, and a number of objections to the charge, including requests for instructions on good faith, commercial reasonableness, circumstantial evidence and non-compartmentalization of evidence, were discussed. But by the end of that session, as the pre-Christmas Thursday afternoon waned, all involved, Court and counsel, were in evident agreement that the task of special exceptions could not be accomplished within the constraints of the case and were unnecessary in light of all that had transpired before.

Under the circumstances involved here, the trial court was fully informed as to the positions of the parties and the issues involved. There had been extensive and exhaustive conferences between counsel and the trial court in the afternoon and evening prior to the closing arguments and instructions to the jury. These conferences involved a comprehensive discussion of the positions of the parties with respect to framing the Special Interrogatories, as well as with respect to the basic legal theories of the case. Prior to this there had been legal arguments in regard to a motion for a directed verdict. Further, each party had submitted comprehensive requests for charge with citations, and pre-trial memoranda on the contract, tort and antitrust issues in the case.

At the end of a four-week trial where there were such extensive undertakings to illuminate the legal issues, it would have been pointless formality, as well as impractical, to go through all of the requests for charge for the parties, particularly in view of the circumstances present at the end of this trial. Accordingly, counsel and the Court acquiesced in Sharon's counsel's suggested procedure:

> "MR. BOOKER: We note an exception, Your Honor. Finally, Your Honor has noted he has denied the request for charge of the defendant as submitted in the pretrial, our requests for charge in nearly every instance, accompanied by our citations to the authorities and which gives the basis for the proposed request for charge and in each instance relying on the authorities that we cite there. We take an exception to the Court's denial of all the requests for points of charge.
> MR. SCHMIDT: We do the same as to ours, Your Honor.
> THE COURT: All right." (Tr. 106, In Chambers Proceedings, December 22, 1977, 2:20 p.m.)

Despite the circumstances present, the Third Circuit apparently held that, under *Copperweld Steel Co. v. Demag-Mannesmann- Bohler*, 578 F.2d 953, 958 n. 4, 960 (3d Cir. 1978), AMI had properly preserved its objections to the charge on only two specific issues, commercial reasonableness and non-compartmentalization of the evidence (A.3a-5a). It quoted Fed.R.Civ.P. 51 to that effect:

> "'No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.'" (A. 5a)

On the other hand, other Courts of Appeals have held that the requirements of Fed.R.Civ.P. 51 are met where it is clear that the trial court was aware prior to the charge of the positions of the parties as to the instructions and further objection would have been a pointless formality. Thus, in *Gradsky v. Sperry Rand Corp.*, 489 F.2d 502 (6th Cir. 1973), a civil antitrust action, plaintiff submitted 50 proposed instructions and filed written objections to defendant's 112 proposed instructions. As here, both parties submitted extensive pretrial briefs. Plaintiff did not formally object to the charge finally submitted to the jury, but there were extensive in-chambers conferences in regard to the issues for charge. The Court held that Fed.R.Civ.P. 51 was satisfied:

> "After an exhaustive review, including three informal conferences in chambers where the proposed charges were reviewed and discussed, the trial court charged the jury. The appellant did not formally object to the court's charge, but now urges that his detailed requests for jury instructions and his written objections to the defendant's requested jury instructions are sufficient to preserve his objections under Rule 51.
>
> "Rule 51, construed in light of Rule 46's discouragement of formality in procedures,[2] does not require formal objections, but the Rule is satisfied only if it is clear that the judge was made aware of the possible error in or omission from the instructions. E.g. Sears v. Southern Pacific Co., 313 F.2d 498 (9th Cir. 1963). The purpose of the Rule is to inform the court of possible errors in the charge 'to afford [the] trial judge opportunity to correct error in his charge before the case is finally submitted to the jury.' Moore v. Stephens, 271 F.2d 119, 120 (6th Cir. 1959). The court, insofar as the instructions were covered by the appellant's proposals and objections to the appellee's proposals, was aware of the appellant's objections to the charge as given." (Footnote omitted.) 489 F.2d at 503.

Other Courts of Appeals have similarly held that where dissatisfaction with the charge had been expressed in prior conference with the trial court and no further objection was made, there is no waiver, holding that Fed.R.Civ.P. 51 does not require pointless formalities. *Robinson v. Heilman*, 563 F.2d 1304, 1306-7 (9th Cir. 1977). *See also*, *Williams v. Hoyt*, 556 F.2d 1336, 1340 (5th Cir. 1977), *cert. denied*, ___ U.S. ___, 98 S. Ct. 1530, 55 L.Ed.2d 544 (1978); *Stewart v. Ford Motor Co.*, 553 F.2d 130, 140 (D.C. Cir. 1977); *United States v. Hollinger*,[9] 553 F.2d 535, 542 (7th Cir. 1977); *Batesole v.*

[9]Although a number of cases herein cited involve Federal Rule of Criminal Procedure 30 rather than F.R.Civ.P. 51, similar standards are applied to both rules. *Hamling v. United States* 418 U.S. 87, 133 n. 19 (1974).

Stratford, 505 F.2d 804, 808 (6th Cir. 1974); *United States v. Hamling*, 481 F.2d 307, 324-5 (9th Cir. 1973), *affirmed*, 418 U.S. 87 ;(1974); *Meitz v. Garrison*, 413 F.2d 895, 899 (8th Cir. 1969); *Buckley v. Valley Camp Coal Co.*, 324 F.2d 244, 246, n. 1 (4th Cir. 1963); *Las Vegas Merchant Plumbers Association v. United States*, 210 F.2d 732, 744 (9th Cir. 1954), *cert. denied*, 348 U.S. 817 (1954). Under the foregoing decisions petitioner submits that all its objections to the charge were properly preserved. This would be especially true here where petitioner had no advance opportunity to review the charge.

We submit that the above decisions correctly interpret the applicable law and are in direct conflict with that of the Third Circuit in the instant case, as well as other Courts of Appeals which hold that the only exception to the strict application of Fed.R.Civ.P. 51 is where fundamental error is present. *Fox v. Ford Motor Co.*, 575 F.2d 774, 788 (10th Cir. 1978); *French v. United States*, 487 F.2d 1246, 1247 n. 1 (1st Cir. 1973); *United States v. Taglianetti*, 456 F.2d 1055, 1057 (1st Cir. 1972); *Dunn v. St. Louis-San Francisco Railway Co.*, 370 F.2d 681, 683 (10th Cir. 1966). It is proper and necessary that this Court exercise its supervisory powers to resolve this conflict.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

United States Court of Appeals

FOR THE THIRD CIRCUIT

NOT FOR PUBLICATION

No. 78-1751

AMERICAN INDUSTRIES CORP.,
Appellant,
v.
SHARON STEEL CORPORATION,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(Civ. No. 74-1122, W.D.Pa.)

Argued September 28, 1978
Before SEITZ, *Chief Judge*, HUNTER, *Circuit Judge*,
and LACEY*, *District Judge*.
(Filed November 1, 1978)

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H. YALE GUTNICK, ESQUIRE
R. HENRY MOORE, ESQUIRE
ROSE, SCHMIDT, DIXON, HASLEY,
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New York, N.Y. 10017
Attorneys for Appellant

*The Honorable Frederick B. Lacey, United States District Court Judge for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

PER CURIAM.

Plaintiff, American Industries Corp. (AMI), appeals from the final judgment of the district court, entered in accordance with a jury verdict, in favor of defendant, Sharon Steel Corporation (Sharon), on a counterclaim, and against AMI on all counts of its claim. AMI also appeals from the court's order denying its motions for a new trial and to alter and amend the judgment.

AMI brought a diversity suit in the district court against Sharon, alleging breach of contract and tortious interference with plaintiff's business relationships; AMI also sought treble damages for an alleged violation by Sharon of § 1 of the Sherman Act, 15 U.S.C. § 1. Sharon counterclaimed against AMI for an alleged breach of contract. The jury returned a special verdict against AMI on all counts, and awarded damages of $1,168,710.00 to Sharon on its counterclaim. That verdict was rendered pursuant to the jury's answers to twenty-two special interrogatories submitted by the trial judge after consultation with counsel for both parties.

AMI contends that the trial judge's charge to the jury, accompanying its submission of the special interrogatories, was so insufficiently detailed, erroneous and incomplete as to constitute fundamental error. It also claims prejudice in the court's failure to charge the jury on particular requested points, and submits that the jury's verdict was contrary to the weight of the evidence, that answers to the special interrogatories were internally inconsistent, and that the damages awarded by the jury to Sharon were excessive. Based on these assertions, AMI contends that its motions for a new trial and to alter or amend the judgment should have been granted by the district court, and requests that this Court reverse the judgment below and remand for a new trial.

We note at the outset that AMI's appeal is focused upon the alleged inadequacies of the trial judge's instructions to the jury. AMI asserts that the jury made findings that were unsupported by the evidence and internally inconsistent and awarded damages to Sharon that were excessive, because of the court's failure to properly instruct the jury on the legal issues presented in this case.

After reviewing the record before us, we find that the trial court's charge to the jury, viewed as a whole, gave "the jury such explanation and instruction concerning the matter thus submitted as [was] necessary to enable the jury to make its findings upon each issue." F.R. Civ. P. 49 (a) (Special Verdicts). In this respect we note that one of the salutary purposes of Rule 49 (a)'s provision for special verdicts is to enable the trial judge to simplify his instructions to the jury: "When, therefore, the general charge adequately directs the jury to its duties in answering the questions submitted to it there is no need to accompany the submission with repetitive instruction." *Lawrence v. Gulf Oil Corp.*, 375 F.2d 427, 429 (3d Cir. 1967) (en banc).

In its motion for a new trial AMI asserted that the district court erred in refusing to instruct the jury in accordance with seventy-five of its requests for charge. However, during the conference between the trial judge and counsel which took place in chambers immediately following the court's charge to the jury, the court specifically invited counsel to make any request they wished or to state any exceptions to the charge as delivered, so that it might be corrected before the jury retired to consider its verdict. At that time counsel for AMI requested that the court deliver further charges with respect to "non-compartmentalization" of the evidence supporting its antitrust claim, the concept of good faith and commercial reasonableness under the Uniform Commercial Code, and general charges on circumstantial evidence and duplication of damages. The court denied the first two requests, indicat-

ing its belief that the instructions already given had adequately covered the points raised.

The function of an appellate court in reviewing the trial court's instructions to the jury "is to determine whether the charge, taken as a whole and viewed in the light of the evidence, fairly and adequately submits the issues in the case to the jury." *Ayoub v. Spencer*, 550 F.2d 164, 167 (3d Cir.), *cert. denied*, 432 U.S. 907 (1977). We find no reversible error in the court's failure to specifically charge the jury on the concept of good faith; AMI has failed to demonstrate how the requested charge was relevant to any particular aspect of its breach of contract claim.

Likewise, we find no reversible error in the court's failure to charge on "non-compartmentalization" of the evidence. That point was addressed to the special interrogatory that called upon the jury to decide whether Sharon had combined or conspired with a subsidiary, Ohio Metal Processing Company, with the intent or for the purpose of eliminating or destroying AMI as a competitor of the subsidiary. The requested charge was designed to insure that the jury look at the "whole picture," and not merely the individual factual components adduced as evidence at trial, in determining the existence of a combination or conspiracy in restraint of trade. We do not find the omission of such an instruction to be so substantial as to rise to the level of reversible error.

Mindful of our limited function in reviewing the trial court's charge to the jury, we find no fundamental error in the court's failure to instruct the jury in accordance with the numerous other points raised by AMI. Moreover, we note that, as to these points, AMI is relying on a general exception to the charge as delivered in a case in which the trial judge had asked counsel for specific objections. Absent fundamental error, such a general exception will not preserve a party's objections on appeal under the requirement of F.R. Civ. P. 51 that: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the gounds of his objection." *See Copperweld Steel Co. v. Demag-Mannesmann-Bohler*, 578 F.2d 953, 958 n.4, 960 (3d Cir. 1978).

In sum, we find that the trial court did not err in failing to charge the jury in accordance with AMI's specific objections to the instructions as given, nor was the charge, viewed in its entirety, so inadequate as to constitute fundamental error. Furthermore, we find evidence in the record to support the jury's verdict and its award of damages, and find AMI's assertion that the jury's answers to the special interrogatories were internally inconsistent to be meritless. We note that AMI's arguments before this Court on the latter issues rely principally on its own view of the facts from which this dispute arose, and thus disregard the jury's resolution of those factual questions that were contested at trial.

The trial judge found AMI's motions for a new trial and to alter or amend the judgment to be without merit. Having reviewed AMI's contentions before this Court, we conclude that the district court's refusal to grant AMI's motions was not "inconsistent with substantial justice." F.R. Civ. P. 61.

The judgment of the district court will be affirmed.

To the Clerk of the Court:

Please file the foregoing opinion.

United States Court of Appeals
FOR THE THIRD CIRCUIT

No. 78-1751

AMERICAN INDUSTRIES CORP.,
Appellant

vs.

SHARON STEEL CORPORATION

(D.C. Civil No. 74-1122)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge* and HUNTER, *Circuit Judge* and LACEY, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on September 28, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgement of the said District Court, filed December 30, 1977, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:

/s/ BETTY J. ROBINSON
Deputy Clerk

November 1, 1978

*The Honorable Frederick B. Lacey, United States District Court Judge for this District of New Jersey, sitting by designation.

United States Court of Appeals
FOR THE THIRD CIRCUIT

No. 78-1751

AMERICAN INDUSTRIES CORP.,
Appellant

v.

SHARON STEEL CORPORATION

(Civil No. 74-1122, W.D. Pa.)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, *Circuit Judges*, LACEY, *District Judge*.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ SEITZ
Chief Judge

Dated: November 28, 1978

APPENDIX C

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 78-1751

AMERICAN INDUSTRIES CORP.,
Appellant

vs.

SHARON STEEL CORPORATION

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until January 4, 1979.

/s/ JAMES HUNTER III
Circuit Judge

Dated: December 14, 1978

APPENDIX D

In The United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN INDUSTRIES CORP.
vs
SHARON STEEL CORP.

Civil Action No. 74-1122

ORDER

AND NOW, this 10th day of May, 1978, after argument and upon due consideration of plaintiff's Motion for New Trial, Motion to Alter or Amend Judgment, and Motion for Stay of Execution and Request for Form of Security in Lieu of Bond,

IT APPEARING that the Motion for New Trial and the Motion to Alter or Amend Judgment are clearly without merit, and

IT FURTHER APPEARING that evidence proffered in support of the Motion for Stay of Execution and Request for Form of Security in Lieu of Bond, fails to establish that plaintiff's suggested "conditions for the security of the adverse party ... are proper," F.R. Civ. P. 62(b),

IT IS ORDERED that the said Motions be and the same are hereby denied.

/s/ HERBERT P. SORG D.J.

cc Counsel of Record

APPENDIX E

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN INDUSTRIES CORPORATION
vs.
SHARON STEEL CORPORATION

Civil Action File No. 74-1122

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Herbert P. Sorg, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, to special interrogatories as follows:

1. Did Sharon breach the agreement for 1973? yes ___ no X
2. Did the parties intend that the agreement for 1973 and any obligations arising under the agreement for 1973 would be cancelled by the agreement for 1974? yes ___ no X
3. If your answer to Special Interrogatory 1 is "yes" and your answer to Special Interrogatory 2 is "no" then state here what damages were sustained by AMI as a result of Sharon's breach of the agreement for 1973. _____ (Insert amount)
4. Answer this only if your answer to Interrogatory 2 is No. Did the parties intend that full performance of the agreement for 1974 would replace and cancel all obligations of the parties under the agreement for 1973? yes X no ___
5. Did Sharon agree to deliver to AMI no less than a minimum quantity of 5,700 tons of steel in each month during the term of the agreement for 1974? yes X no ___

6. If your answer to Special Interrogatory 5 is "yes" did Sharon fail to comply with that term of the agreement for 1974? yes ___ no X
8. If your answer to the preceding Special Interrogatory is "yes," did AMI sustain any damages as a result of said breach? yes ___ no ___
9. If your answer to the preceding Special Interrogatory is "yes," what damages were sustained by AMI? _____ (Insert amount.)
10. Did Sharon agree that the prices to be charged AMI under the agreement for 1974 were to be based on those established by the major mills, principally U.S. Steel? yes ___ no X
11. If your answer to the preceding Special Interrogatory is "yes," did Sharon fail to comply with that term of the agreement for 1974? yes ___ no ___
13. If your answer to the preceding Special Interrogatory is "yes," did AMI sustain any damages as a result of this failure to comply? yes ___ no ___
14. If your answer to the preceding Special Interrogatory is "yes," what damages were sustained by AMI? _____ (Insert amount.)
15. Did AMI fail to comply with the terms of the agreement for 1974 concerning the purchase of steel in 1974 and the first three months of 1975? yes X no ___
16. If your answer to the preceding Special Interrogatory is "yes," what damages were sustained by Sharon? $1,168,710.00 (Insert amount.)
17. Did Sharon engage in a course of conduct specifically designed to injure AMI by interfering with its business relations with others? yes ___ no X

18. If your answer to the preceding Special Interrogatory is "yes," did AMI sustain damages as a result thereof? yes ___ no ___

19. If your answer to the preceding Special Interrogatory is "yes," state the amount of damages sustained by AMI? _____ (Insert amount.)

20. If your answer to Special Interrogatory 17 is "yes" and you find that Sharon's conduct was malicious, then insert here an appropriate amount as exemplary damages. _____ (Insert amount.)

21. Do you find that Sharon combined or conspired with Ohio Metal Processing Company with the intent or for the purpose of eliminating or destroying AMI as a competitor of Ohio Metal Processing Company? yes ___ no X

22. Did Sharon enter into a combination or conspiracy with Ohio Metal Processing Company to injure competition and to unreasonably restrain trade or commerce? yes ___ no X

23. If your answer to either Special Interrogatory 21 or 22 is "yes," did AMI suffer any injury as a result of such conduct? yes ___ no ___

24. If your answer to the preceding Special Interrogatory is "yes," state the amount of damages sustained by AMI as a result thereof? _____ (Insert amount.)

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of the defendant, Sharon Steel Corporation, and against the plaintiff, American Industries Corporation, in the amount of $1,168,710.00, together with costs.

Judgment is hereby entered in accordance with the above special verdict.

Dated at Pittsburgh, Pennsylvania, this 30th day of December, 1977.

/s/ JACK L. WAGNER
Clerk of Court

Approved: /s/ HERBERT P. SORG
United States
District Judge

APPENDIX F

CHARGE OF THE COURT

[2262] THE COURT: Members of the jury, it is now your responsibility to decide from the evidence in this case whether the plaintiff is entitled to compensation from the defendant for damages alleged to have been sustained by him and, if so, how much. And also whether the defendant is entitled to compensation from the plaintiff for damages alleged to have been sustained by it and, if so, how much.

In your determination you are to be guided by reason such as you use in carrying on your everyday affairs.

You are not to be influenced by any sympathy or prejudice that you may feel for or against either of the parties.

You must decide the facts, and then apply the law to those facts as you are instructed.

You are the sole judges of the facts. Therefore, you, and you alone, decide what is to be believed.

In doing so, you must pass upon credibility of the witnesses.

You may judge the credibility of a witness by the manner in which he gives his testimony, his demeanor upon the stand, the reasonableness or unreasonableness of his testimony, his means of knowledge about any fact concerning
[2263] which he testifies, his interest in the case or the feeling that he may have for or against the plaintiff or the defendant, or any circumstances tending to shed light on the truth or falsity of his testimony.

You are at liberty, in the exercise of honest judgment, to believe or disbelieve the testimony of any witness in whole or in part, taking into consideration, of course, all the facts and circumstances of the case.

And it is for you to say what weight you will give to the testimony of any and all of the witnesses.

In this connection, the rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions.

An exception to this rule exists as to those whom we call expert witnesses. A witness who, by education and experience, has become expert in any art, science, profession or calling, may be permitted to state his opinion as to a matter in which he is knowledgeable and which is material to the case, and he may also state the reasons for his opinion.

You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves.

You may accept the opinion or reject it entirely, if you decide that the opinion is not based on sufficient education or experience, or if you conclude that the reasons given in [2264] support of the opinion are unsound.

Now your verdict must be based entirely upon the evidence that has been brought before you in this courtroom.

The evidence consists of the testimony of the witnesses and the documents or exhibits that have been admitted. Also, the stipulations of the parties are evidence. And these you must accept as true.

You are cautioned that the remarks of counsel, for instance, are not evidence. Remarks of the Court are not evidence.

Then, too, the facts of the case must be decided by you according to your own recollection of the evidence.

You are, therefore, not to be influenced by any expressed recollection of counsel or of the Court in deciding what the facts are if such recollection is inconsistent with your own.

Now for these reasons the Court will not review all of the evidence, but will refer to certain evidence only for the purpose of placing the law in context.

It is your recollection of the evidence upon which your decision must be based.

In this case, you are asked to decide, actually decide four principal issues involving four separate claims; three by the plaintiff; one by the defendant.

[2265] That is, the plaintiff, American Metals Industry—or American Industries Corporation, which I shall refer to as AMI, and one claimed by the defendant, Sharon Steel Corporation, which I shall simply refer to as Sharon.

Of course, the claims of AMI involve, first of all, breach of contract.

Second of all, a claim based upon an allegation of a tort by virtue of an interference with a business relationship with a third person.

The third claim on the part of AMI which, of course, is based on a separate and a distinct reason, although the same facts may be involved, has to do with an allegation of violation of the antitrust acts of the United States.

Sharon's claim is based solely upon an alleged breach of contract by AMI.

There is no dispute that AMI and Sharon, in the latter part of 1972, entered into an agreement under which AMI was to purchase from Sharon and Sharon was to sell steel to AMI during the year 1973.

In the latter part of 1973, the same parties entered into a further agreement for the purchase and sale of steel during the year 1974, and the first three months of 1975.

There is vigorous dispute as to the terms of these agreements.

With respect to the agreement concerning 1973 sales, [2266] the parties differ as to the quantities of steel and the time of delivery agreed upon, AMI contending that it was to receive shipments of regular minimum monthly amounts, and Sharon asserting that it did not undertake to ship any fixed amount per month, but that it merely agreed to deliver the total amount within the period covered by the contract.

And this leads to the first of a series of questions which we have prepared for you in order to assist you in identifying and specifying the issues you must determine; thereby, hopefully, simplifying your task.

Will the clerk deliver to the members of the jury, so they might have in the course of these instructions, the interrogatories agreed to?

I don't want you to try to read all of these interrogatories [2267] at this time. We will refer to them singly and do so together so their retention may not be distracting during the course of the instructions.

The first of these interrogatories has to do with the agreement that was entered into in the latter part of 1972 for the purchase and sale of steel during the year 1973. The question simply asks for your verdict as to whether or Sharon reached this agreement, the dispute between parties being the question of the amount and time of delivery of steel during the course of the year 1973.

AMI is contending that it was entitled to receive under the terms of the agreement for 1973 a minimum monthly amount in each and every month during the period. Sharon is contending that the cause of its reasons and entering into the agreement, if during the year 1973 quantities of steel were delivered during the period of the contract which when over all the months would present, would present the total amount contracted for, then the agreement will have been

complied with. This is the difference between the parties and it is for you to determine from all of the evidence what the parties agreed to and then also to determine whether or
[2268] not there was compliance with the agreement of the parties on the part of Sharon in its deliveries during the year 1973. Simply indicate whether your answer to this question is yes or no.

In order to give an affirmative answer to this agreement, you should find that by a preponderance of the evidence that Sharon did, indeed, agree to deliver steel as contended by AMI and that it failed in complying with that agreement.

Now, by preponderance of the evidence is meant that evidence which, after consideration of all the evidence, leads to the conclusion which seems most probable to you. It does not mean a greater volume of evidence on one side or the other. It simply means that whatever evidence there is on one side of an issue is of greater convincing force, however slight, than evidence to the contrary. Unless there is that preponderance of the evidence, an issue is not established.

The plaintiff has the burden of establishing, first of all, what the agreement as to the delivery of steel during 1973 was and, secondly, that Sharon failed to comply with that agreement.

In order to support an affirmative answer to this question, if you could not find by a preponderance of the evidence that Sharon failed to deliver as agreed upon in the latter part of 1972, then you're warranted in indicating a neg-
[2269] ative answer to this question. Simply check the answer no.

The second interrogatory is did the parties intend that the agreement for 1973 and any obligations arising under the agreement for 1973 would be cancelled by the agreement for 1974, then again you will decide this issue on the basis of the preponderance of the evidence as you see it.

AMI contends that by simply entering into the agreement for 1974 and the latter part of '73, it did not intend to cancel whatever obligations might have existed as a result of the previous existing agreement at that time.

Sharon takes the position that by entering into the agreement for 1974, the parties intended to eliminate or to cancel whatever previous arrangements there were or any obligations that may have arisen from the previous arrangement in view of the terms of the 1974 contract which were to replace any arrangements that they had. This is Sharon's position.

You will answer yes to this question if you find by a preponderance of the evidence that 1973 obligations were to be replaced or cancelled by the parties entering into the 1974 arrangement. If you do not find by a preponderance of the evidence that this effect was intended by the parties or if you do find by a preponderance of the evidence that AMI merely intended by the agreement in the latter part of 1973 to contract for delivery of steel at certain prices during 1974 and [2270] that so far as the 1973 agreement is concerned, all obligations were to be cancelled by virtue of a compliance with the 1974 contract.

Stated in another way, if the 1974 contract were not complied with, that the obligations under the 1973 and all rights of AMI thereunder were preserved.

A negative answer is appropriate if you do not find by a preponderance of the evidence that the parties intended to renew their relationship or the terms and all the terms and conditions of their transactions in which event the 1973 obligations would continue to exist and remain viable, as it were, and enforceable by either of the parties.

Consider all the evidence carefully and answer the question accordingly. Now, you come to the third interrogatory and you note the difference from the second interroga-

tory. The second interrogatory inquired as to whether or not you find the parties intended to cancel by virtue of their entering into a new agreement. The third interrogatory inquires as to whether or not—I beg your pardon—The third interrogatory deals with the question of damages. If you find that there was— If you find that there was a breach of the agreement for 1973 deliveries by Sharon and you also find that AMI sustained damages or losses as a result of Sharon's
[2271] failure to deliver, then you should state the amount of damages or losses sustained by AMI as a result of Sharon's failure to deliver steel during the year 1973.

Damages in such event would consist, first of all, of the losses which AMI sustained as a result of having been deprived of an opportunity to process and resell the steel which would have been delivered under the contract.

You have heard testimony as to AMI's claim of losses as a result of Sharon's failure to deliver steel and, therefore, its having been deprived of an opportunity to make profit on the reselling of the steel.

You have also heard evidence that AMI was subjected to certain losses by reason of its failure to supply a particular customer, as it had admitted itself to do, in reliance on the deliveries of steel under its arrangements with Sharon.

If you find that AMI—If you find by a preponderance of the evidence that AMI sustained such losses as a result of its inability to perform its contracts with other persons, then you are warranted in including that in damages sustained by AMI, which loss would be a loss which would be a legal element of damage if your answer to No. 1 was in the affirmative.

When you get to Special Interrogatory 4, you will note that this is different from Special Interrogatory 2, "Did the parties intend that full performance of the agreement for

1974 would replace and cancel all obligations of the parties [2272] under the agreement for 1973?"

Interrogatory 2 will have given us your answer as to whether or not the parties intended to cancel all previous arrangements by entering into the agreement for 1974, whereas this interrogatory asks for your decision as to whether or not it was the intent of the parties that all obligations under the agreement for 1973 would be cancelled if there was full performance of the agreement for 1974.

Did the parties agree to this proposition? Answer accordingly, depending upon your findings by a preponderance of the evidence.

Proceed to Interrogatory 5, "Did Sharon agree to deliver AMI no less than a minimum quantity of 5,700 tons of steel in each month during the term of the agreement for 1974?"

Consider all of the evidence in this respect and indicate your findings. If you find by a preponderance of the evidence that the parties agreed to regular, minimum, monthly quantities, in the amount of 5,700 tons of steel, answer the question accordingly, yes.

If you do not so find by a preponderance of the evidence, of course, your answer is no.

Answer and proceed to Interrogatory 6. If your answer to 5 is yes, this interrogatory asks your determination from your finding by a preponderance of the evidence as to [2273] whether or not Sharon complied with such a term of the agreement.

The paper in your hand may indicate a Special Interrogatory 7. I have concluded that the answer to this interrogatory is not necessary. So, you will proceed to Interrogatory 8.

Interrogatory 8 should read that in conjunction with your response to Interrogatory 6, if your answer to Interrogatory 6 is in the negative, is no, then, of course, Interrogatory 8 is not applicable.

If your answer to Interrogatory 6 was yes, namely, that there was an arrangement to deliver minimum quantities, regularly each month, then you will determine whether or not AMI sustained any damages as a result of its failure to receive such regular, monthly shipments.

You will answer the question accordingly and proceed to Interrogatory 9. If AMI did sustain damages, what was the amount of its losses as a result of Sharon's failure to deliver according to the agreed upon schedule, should you find there was such a schedule agreed to.

Interrogatory 10, "Did Sharon agree that the prices to be charged AMI under the agreement for 1974 were to be based on those established by the major mills, principally United States Steel?" Yor will recall the testimony and determine
[2274] this dispute, it being AMI's contention and, therefore AMI's burden of establishing a preponderance of the evidence that the prices agreed to for sales for the delivery of steel during the year 1974 were to be based on those established by major mills or the United States Steel.

It is Sharon's contention that the agreement called for prices which Sharon Steel itself established for its products.

Again, answer the question accordingly, depending on your findings by a preponderance of the evidence.

We go to 11. If there was such an agreement, did Sharon fail to comply with the sale at agreed-upon prices as indicated in Interrogatory 10? You will read this in connection with the next Interrogatory 12, "Was its failure to comply—" Well, you will omit No. 12. I have determined that at this point the issue is not appropriate.

You will proceed to Interrogatory 13, if as a result of your answers to the previous interrogatories, you will determine that Sharon agreed to sell at prices established by other mills, principally United States Steel, and also that it failed to comply with this agreement, and the question is, "Was AMI damaged as a result of such breach of any term of the agreement?"

If you find that they were damaged, then Question 14 asks for you to state the amount of such damage sustained.

Interrogatory 15 has to do with the question of whether [2275]
or not AMI breached a contract with Sharon Steel. This, of course, presupposes your determination as to whether or not AMI and Sharon, or a determination as to the terms of the agreement that were entered into, and this question presents an issue as to whether or not Sharon by virtue of a breach of the agreement which was entered into to cover 1974 did so to the extent that the entire value of the agreement was impaired. If by virtue of Sharon's breach of the agreement the entire value of the agreement over the period intended to be covered was impaired, then you may find that if you did previously find that there was breaches on Sharon's part, you may find that an impairment of the value of the entire agreement—if the breaches by Sharon constituted an impairment of the value of the entire agreement, then there was a justification for a termination of the agreement, in which event AMI should not be found to have failed to comply with the terms.

Consider all the evidence carefully and, if indeed you find that Sharon did not breach the 1974 agreement prior to a termination by AMI, or if you find that even though there may have been a breach or breaches, but in immaterial respects which did not affect the entire value of the, or impair the entire value of the contract for the 15-month period, then you would be warranted in answering this question in the affirmative. [2276]

Just stated in another way, the question calls for your determination of whether or not AMI was justified in terminating the relationship. If there were prior breaches on the part of Sharon that impaired the value of the entire contract, then you would answer this question in a negative because in such event there would not have been such a failure to comply as this interrogatory connotes.

If, however, there were no breaches on Sharon's part or such breaches were in immaterial respects, such as not to impair the entire value of the contract, then an affirmative answer would be warranted.

At this point, you will have concluded your determinations with respect to the first claim that you're required to deal with and this is a claim of a breach of contract. This will dismiss in your mind any popular notion that there may be that a contract is a formal written document and in the absence of a writing there could be no contract. This is an erroneous notion sometimes entertained by laymen. The contract may be a formal integrated document which contains the entire agreement or undertaking of parties thereto, but this is not necessary to constitute a legally binding contract.

Mutual promises between two or more persons, no matter how conveyed, by letter, by word of mouth, or by con-
[2277] duct, or by silence in situations where it would be natural, it would be natural to speak as, for instance, where one becomes aware of another's understanding and doesn't correct it, this may constitute an adoption of what another may feel, has been a term of an agreement.

So, I say, by letter, by word of mouth, by conduct, or by representations, a promise may be made or a commitment might be made. If in a given situation it may lead another to rely on it, such understanding may form the basis of a binding obligation, however informal, but nevertheless, a legal contract.

In your consideration, always you should remember, too, while the parties are corporations, corporations are artifically entities. They can act only through their agents, or officers, or employees and are, therefore, bound by the acts of any agent, or officer who is acting within the scope of his authority as delegated by the corporation.

You will have concluded the claim based on breach of contract at this point by both parties.

So far as liability is concerned, there is, however, one more interrogatory, as you have noted, Interrogatory 16 which asks you to indicate an amount, if any, of damages sustained by Sharon as a result of AMI's breach of the contract for 1974.

So, we proceed to the second claim advanced by AMI [2278]
based on a proposition of law which reads as follows: "One who intentionally and improperly interferes with the performance of a contract between another and a third person by preventing the other from performing the contract or causing his performance to be more expensive or burdensome is subject to liability to the other for the pecuniary loss resulting to him."

Hence, Interrogatory 17, which is directed to this claim asks, "Did Sharon engage in a course of conduct specifically designed to injure AMI by interfering with its business relations with others?"

This calls for your finding as to what Sharon's intentions were. Was it Sharon's intention—did it engage in a course of conduct which was designed to interfere with AMI's business relations with other persons?

If you then proceed to 18, if your answer to this interrogatory is yes, did AMI sustain damages as a result thereof, answer yes or no and then proceed to 19. If your answer is

yes, state the amount of damages sustained by AMI as a result of such course of conduct engaged in by Sharon.

With respect to this claim, there's one other matter, and now you will proceed to Interrogatory 20. If you answered in Interrogatory 17 that Sharon engaged in a course of conduct
[2279] which was designed to interfere with AMI's ability to perform its contract with other persons and you do find that it did do so knowingly and willfully or with a malicious intent to injure AMI, then you are warranted in awarding to AMI exemplary or punitive damages.

In this respect, it is the law that in addition to actual or compensatory damages, that is actual losses sustained by an individual as a result of another's wrongful act, the law permits the jury to, under certain circumstances, award the injured person exemplary or punitive damages in order to punish the wrongdoer for some extraordinary conduct and to serve as an example or warning to others not to engage in such conduct.

In other words, the purpose of permitting a jury to award punitive or exemplary damages is to have a deterrent effect on others with respect to the engaging in malicious conduct designed to injure another.

If you should find by a preponderance of the evidence that AMI is entitled to a verdict for actual or compensatory damages and you further find that acts or omissions of the Defendant Sharon which proximately caused actual injury or damage to the Plaintiff was maliciously done, then you may, if in the exercise of discretion you choose to do so, add to the award of actual damages such amount as you shall agree to be proper as punitive and exemplary damages.

In arriving at the appropriate amount of punitive or
[2280] exemplary damages, you may consider the equity or net worth of the defendant, it being the purpose of the law in

permitting a jury to make this assessment to permit the award to an injured party of an amount of money which would, indeed, be punitive. Therefore, it would be felt by the party engaging in malicious conduct designed to injure another person.

An act or failure to act is maliciously done if prompted [2281]
or accompanied by ill will or spite, or a grudge, either towards all persons in one or more groups or categories of which the injured person is a member.

Whether or not you should make such an award, in addition to acts or damages, is a matter exclusively within the province of the jury.

The jury should always bear in mind that exemplary damages may be allowed only if they first award plaintiff a verdict for acts or compensatory damages, and the jury should also bear in mind not only the conditions under which —and the purposes for which the law permits an award of punitive and exemplary damages.

It is also a requirement of law that the amounts of such exemplary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded or fixed in an amount because of any sympathy or bias or prejudice with respect to any party to the case.

This is simply a matter—it is left to your discretion as to whether or not, even if you find that AMI is entitled to compensatory damages, or reimbursement for pecuniary losses sustained by it, whether, in addition to that, and if you find also that the act was maliciously done with a specific pur- [2282]
pose of causing such harm, then, in your discretion, you may award punitive damages in an amount which you feel appropriate under these instructions.

So much for the claim of AMI with respect to interference with business relations. That is tortious interference.

And in Interrogatory No. 18 indicate the amount of such award, if any, should you find the existence of malice.

Correction. Interrogatory 18 has to do with compensatory damages, reimbursement for losses sustained as a result of a tort.

Interrogatory 19 appears to be just a duplication.

Do counsel agree?

MR. SCHMIDT: Did Your Honor ask a question of counsel?

THE COURT: That 18 and 19 is merely a duplication.

MR SCHMIDT: 19 calls for an amount of compensatory damages. And then 20 says, in line with Your Honor's instruction, if exemplary damages are deserved because of the element of maliciousness or intent, then the amount of those damages—

THE COURT: 19 and 20 are different. All right. Read
[2283] 18 and 19 together.

18 simply inquires as to whether they sustained any damages.

19 requires your calculation of the damages which you believe it did sustain, if your response is that they sustained damages at all.

Now this will bring us to the fourth claim which you will deal with in your deliberations, which your decision is required.

"Do you find that Sharon combined or conspired with Ohio Metal Processing Company with the intent or for the purpose of eliminating or destroying AMI as a competitor of Ohio Metal Processing Company?"

Now naturally you will observe that this is closely related to the claim made with respect to tortious interference with business relations. But there is a difference.

Under the claim based on tort or intentional interference with one's business relations with another, the name, itself, indicates that it has to do with injuries to a person or an individual or a group of individuals, as such.

Interrogatory 21 has to do with the antitrust laws of the United States.

Congress, in its wisdom, years ago, has determined that in a free enterprise system, either competition or regulation are necessary for the public's protection. [2284]

Should anyone acquire a monopoly, for instance, especially of a basic material, the public could be substantially injured by the amount that it might be required to pay for such material.

The only substitute for competition, in that event, would be regulation, such as there is of public utilities, for instance. Although monopolies are granted to public utilities, competition is not protected.

The very term, "monopoly", indicates a lack of competition. One party is in control.

But, in such cases where there is no competition for the service or commodity, regulations are established to do that which competition in other fields does.

It's of public benefit that the suppliers of products and services should be required to compete, and that such competition would have a tendency to make the materials or services available to the public at the lowest possible price.

This question asks whether or not Sharon combined, as the law says, whether or not it entered into a combination or conspiracy with Ohio Metal Processing Company with the

intent or for the purpose of eliminating or destroying AMI as a competitor of Ohio Metal Processing Company?

Now keep in mind that this interrogatory also has to do
[2285] with intent. Do you find a preponderance of the evidence that Sharon and Ohio Metal combined or conspired with each other for the purpose of destroying AMI as a competitor.

You may indicate your finding by a preponderance of the evidence. Yes or no.

I should correct that statement and say that unless you do find by a preponderance of the evidence that there was such a combination or conspiracy, your answer should be no.

If there is no preponderance of the evidence either way, your answer should still be no.

In order to return affirmative answers to any of these questions, it should be based upon your finding by a preponderance of the evidence.

If there is not preponderance of the evidence, your answer should be no.

Proceed to Interrogatory No. 23.

If you have determined that Sharon and Ohio Metal Processing entered into, combined or conspired with each other for the purpose of putting AMI out of business or destroying it as a competitor, you simply answer whether or not you find AMI suffered any injury as a result of such conduct.

Then proceed to Interrogatory 24.

[2286] If you find that AMI did suffer damages as a result of a conspiracy or combination between Sharon and Ohio to destroy AMI as a competitor, then state the amount of damages which it sustained. Or, in other words, what did AMI lose as a result thereof.

MR. WENTLEY: If the Court please, I believe you inadvertently did not discuss Interrogatory No. 22, and I thought I'd bring that to the Court's attention.

THE COURT: 22?

MR. WENTLEY: I believe so, sir.

THE COURT: I certainly didn't. Interrogatory 22 is different from the subject matter of Interrogatory 21, in that it does not ask if Sharon and Ohio Metal Processing combined or conspired with each other for the purpose of putting AMI out of business or destroying it as competitors.

This inquires as to whether or not Sharon and Ohio entered into a combination or conspiracy to injure competition. That is, whether—entered into a conspiracy for the purpose of imposing some restraint upon trade.

Remembering the purpose of the antitrust laws, that is, to preserve competition, if you should find by a perponderance of the evidence that Sharon and Ohio Metal Processing engaged in a course of conduct or entered into a combination or conspiracy to impose restraint on the free movement of trade, in other words, simply to affect competition, we'll say, to remove competition to its full extent, from a relevant market area, and an affirmative to this question is warranted. [2287]

But it has to do with a restraint of trade or an interference with competition which is unreasonable.

If there is a combination or a conspiracy and their course of conduct had the effect of unreasonably imposing a restraint upon trade, or the removal of competition from the trade.

These are the several elements you should find by a preponderance of the evidence in order to warrant an affirmative answer to this question.

If you do not so find by a preponderance of the evidence as to any one of these factors, first, if you do not find that there was a combination or a conspiracy, if you do not find it was for the purpose of injuring competition or to impose a restraint upon trade within the area covered by Sharon products, then, in the absence of any of these elements, your answer should be no.

If, however, you find all three conditions existing, that there was a combination, that there was an injury to competition, or as stated in another way, unreasonable restraint upon free trade, in the absence of any one of those matters, your answer should be in the negative.

If, however, you find the existence of all of them, then you should answer yes, that there was a violation of the anti-
[2288] trust act, in other words.

It is peculiar to this particular law, too, that while Congress has said a violation of the antitrust acts is illegal, and therefore could be made the subject of criminal prosecution, as it were, it also provides that a private person may seek redress for any damages sustained as a result of an illegal act or to the antitrust laws, which is what AMI is doing in this case.

It has been said that it acts in the capacity of a private attorney general. Private persons have a right to seek redress for any damages sustained as a result of a violation of the antitrust laws.

We will then go to Interrogatory 23 and determine whether or not AMI suffered any injury as a result of Sharon and Ohio's combination or conspiracy to injure competition. Simply determine whether or not AMI sustained any damages as a result thereof.

And then go to 24. If they did sustain damages, how much. Insert the amount.

Members of the jury, consider all of the evidence carefully with respect to the several questions that are presented to you, answer them accordingly as you find from all of the evidence. Use your common sense and that judgment which you use in carrying on your everyday affairs. Give your answers accordingly.

Now we're going to recess for lunch. [2289]

Counsel is requested to come to chambers, and court will be in recess. The jury will retire.

(Thereupon, court recessed at 2:17 o'clock p.m.)

(Whereupon, the following proceedings were held in [2290] open court.)

THE COURT: Would counsel come to the Bench for just a moment?

(Whereupon, the following was had at side bar.)

THE COURT: At this point, it would be customary to excuse the alternate jurors.

MR. SCHMIDT: I think that's right.

THE COURT: Unless counsel agree to another arrangement? I understand that in some jurisdictions the alternate jurors are retained until a verdict is reached.

Have you, because of the possible weather conditions, and so forth, and the fact that we may lose a juror, has there been any agreement signed to accept a verdict of five, for instance?

MR. SCHMIDT: We would be agreeable to retain the alternate jurors.

MR. ROBINSON: Yes.

MR. WENTLEY: That is fine with us, to excuse the alternate jurors and accept the verdict of five if someone should become incapacitated.

MR. ROBINSON: No, your Honor.

[2291] MR. GUTNICK: Your Honor, we prefer to retain the two jurors until a verdict is reached so that there is no possibility that that could occur. We would want a unanimous verdict.

MR. WENTLEY: I am concerned, your Honor, that alternates participating in deliberations may affect the verdict. I feel that it is my understanding that alternates must be excused and the jury proceed to its deliberations.

THE COURT: We'll follow the usual practice.

Mr. Wentley?

MR. WENTLEY: Yes, sir?

THE COURT: Has there been any stipulation as to the possibility of five if one juror becomes incapacitated?

MR. WENTLEY: I would so agree.

MR. GUTNICK: We will so agree.

THE COURT: All right.

(Whereupon, the following proceedings were held in open court.)

THE COURT: Members of the jury, there have been a few matters that have been properly brought to my attention. First of all, it is possible that the Court may have misrepresented the contention of Sharon with respect to the dispute concerning the 1973 contract for 1973.

First, I should make it clear that if there was any reference at all concerning a dispute as to price for 1973 deliveries, this was erred. I don't recall that any reference was made to a dispute as to price on the contract for 1973. It is my recollection that this recollection called for fixed price for deliveries of steel and that there is no dispute as to that. I may have misrepresented a contention of Sharon Steel, however, with respect to the time and quantity of deliveries during 1973. I believe I stated that it was Sharon's contention that or that it was Sharon's contention that the arrangement for 1973 had to do only with a total volume to be delivered during the term of the contract. This is not Sharon Steel's contention. It is Sharon Steel's contention that they did not agree to delivery of any specific quantities of steel. In 1973, there was to be a continuation of the previously adopted arrangement and steel would be delivered as available on what had been referred to in the testimony as a flywheel basis. This is a contention of Sharon and not that they had agreed to an overall quantity. [2292]

In another connection, with respect to the interrogatories, Interrogatory 4 is to be answered only in the event your answer to Interrogatory 2 is no. I am going to give you new pages to substitute for that which indicates Special Interrogatory No. 4. This new page will contain the instruction that it is not necessary to answer Interrogatory 4 unless your answer to Interrogatory 2 is no.

Will you direct the new pages to be substituted? Just remove Special Interrogatory 4 from your own group of papers and insert the new pages that are being given to you. [2293]

THE CLERK: (Indicating)

THE COURT: In accordance with your findings you do arrive at a question of damages, it will naturally occur to you that the inquiry as to the amount of damages sustained may

be duplicated of another period. It is the law that a plaintiff is entitled to recover damages only once, they are not to be duplicated. However, in response to the interrogatories, don't be concerned about the fact that there may be a duplication. Simply direct your answer to the theory on claim, and the fact that you may arrive at the same damages on different bases, would not be improper.

In other words, if you arrive at damages or an assessment of the losses under the contract claim, you may also assess losses under the tort claim or the antitrust claim, although they may be the same losses so indicated in your responses concerning amount of damages. We will be able to separate them.

I suggest that you are not to deduct under one claim because you have made an allowance under another claim. although it may appear to be a duplication. In the setting of this case, they can be segregated. We will be able to do that. That is all that's necessary.

Has the Court covered the matters discussed with
[2294] counsel?

MR. GUTNICK: Yes, your Honor. Well, there also is one more.

MR. WENTLEY: There is one more, your Honor.

THE COURT: Yes, I understand.

In calculating damages or arriving at an amount that is, as I say, again, you arrive at the point where damages are to be assessed, it is the law that if a party fails to mitigate his damages to the extent that he reasonably can, he can be prevented from recovering all or any of his damages. In other words, the law does not allow a party to recover damages for those consequences of an injury which he could reasonably have avoided. Simply another way of saying that, a party,

although he may be entitled to damages, has the duty to mitigate or to take alternative measures which may reduce the amount of his loss to the extent that he can reasonably do so. This is his duty. In effecting damages, be guided accordingly.

Now, the Court observes that the six regular jurors appear to be in good physical condition and, therefore, the alternate jurors will be excused with the thanks of the Court. It will be necessary to report further so far as the alternates are concerned.

If there is nothing further, you are able to retire.

A few housekeeping matters. Remember that your ver- [2295]
dict must be unanimous. I am going to supply you with one set of interrogatory forms, the first page of which is entitled "Special Verdict." Each and every one of you, after answering the interrogatories, I suggest that this set of forms be used for this purpose, each and every one of you should sign on one of the lines provided for signatures before returning.

It is suggested that before you begin your deliberations you select from among your group foreman to provide—possibly a secretary—to perform such services, and you must assign for the sake of keeping order.

Further, if there is any matter of law concerning which you may desire further instructions, it is proper for you to make that—make a request to that effect.

If I have not, if I have not sufficiently clarified the law to your satisfaction, or if there is any matter concerning which you may desire further clarification, simply put your question in writing, place it in an envelope, seal it and deliver it to the bailiff who will be in attendance upon you. I will be glad to give you further instruction.

In communicating with the Court, you should not indicate where you stand on any issue numerically or otherwise. Your deliberations are secret.

Also, the Court is not able to instruct you as to a matter
[2296] of fact. In this respect, you are the sole judges of the facts. This prerogative and this responsibility should not be invaded by the Court. Your questions should have to do with the applicable law.

If there's nothing further, the jury will retire.

The bailiffs will be sworn.

(Whereupon, the bailiffs were sworn in.)

THE COURT: Will counsel process and approve the exhibits to be give to the Court or the Jury?

COUNSEL: (Indicating)

(Whereupon, the jury was retired to begin its deliberations for a verdict.)

THE COURT: The Court will be in recess.

(Whereupon, the Court was recessed on the twenty-second day of December, 1977.)

Federal Rule of Civil Procedure
Rule 49.

SPECIAL VERDICTS AND INTERROGATORIES

(a) **Special Verdicts.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

Federal Rule of Civil Procedure
Rule 51.

INSTRUCTIONS TO JURY: OBJECTION

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1066

AMERICAN INDUSTRIES CORPORATION,
Petitioner,

v.

SHARON STEEL CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

STATEMENT OF THE CASE

American Industries Corporation ("AMI") filed this action against Sharon Steel Corporation ("Sharon") in the United States District Court for the Western District of Pennsylvania on November 18, 1974. Three years later, on November 30, 1977, trial began before the Honorable Herbert P. Sorg and a jury. The trial lasted 17 days.

At the time of trial, AMI sought to impose liability on Sharon for breach of a contract for the sale of steel beginning in 1973; for breach of a contract for the sale of steel in 1974 and thereafter; for a conspiracy in violation of section 1 of the Sherman Act, 15 U.S.C. § 1; and for tortious interference with actual or prospective business relations of AMI.

Sharon itself pursued a counterclaim, alleging that AMI breached the 1974 contract. Sharon contested the

1973 contract claim on the grounds both that no breach had occurred and that Sharon's performance of the 1974 contract served to discharge entirely the 1973 contract. Sharon also denied the Sherman Act and common law tort claims.

The trial judge submitted the case to the jury on the basis of 22 special interrogatories. These interrogatories were formulated during an afternoon and evening conference between counsel and the judge on the day before trial ended. The interrogatories and the charge were directed to the specific areas of disputed fact.

As to the 1973 contract claim, the specific dispute between the parties concerned the amount and time of shipment of steel under the contract. AMI contended that a minimum of 7,500 tons were to be shipped within each month of 1973. Sharon contended that the steel was to be shipped on a "flywheel" or "excess tonnage" basis; that is, Sharon would ship the steel beginning (but perhaps not ending) in 1973 in such amounts and at such times as Sharon had excess production capacity in its mill.

Without objection from the parties, then or now, the court instructed the jury that this was the determinative factual question as to the 1973 contract dispute. A.17a-18a and 35a.[1] The trial court also instructed the jury concerning the burden of proof and concerning the elements of a binding contract. A.18a-19a. The jury was then asked the following interrogatory and gave the following answer:

---

1. The reference "A." refers to the appendices to AMI's Petition for Writ of Certiorari or to the successively paginated appendix to this Brief.

1. Did Sharon breach the agreement for 1973?

   Yes ___

   No X

The jury concluded that the 1973 contract did not require minimum monthly shipments and that Sharon properly made deliveries on a flywheel basis.

There were three areas of dispute between the parties concerning the 1974 contract. First, the parties disagreed about the intended effect of the 1974 contract on the remaining obligations of the parties under the 1973 contract. AMI argued that only full performance of the 1974 contract would discharge the 1973 contract. Sharon's contention was that the 1973 contract was fully discharged upon execution of the 1974 contract. The trial court explained this dispute to the jury, asked the following interrogatories and received the following answers:

2. Did the parties intend that the agreement for 1973 and any obligations arising under the agreement for 1973 would be cancelled by the agreement for 1974?

   Yes ___

   No X

4. Answer this only if your answer to Interrogatory 2 is No. Did the parties intend that full performance of the agreement for 1974 would replace and cancel all obligations of the parties under the agreement for 1973?

   Yes X

   No ___

Thus, the jury ruled in accordance with AMI's contention on this point.

Second, the parties disagreed concerning the schedule of deliveries under the 1974 contract. AMI argued that Sharon was obliged to ship an absolute minimum monthly quantity of 5,700 tons of steel throughout the term of the agreement and that Sharon had not done so. Sharon argued that it was obliged to ship substantial tonnages of steel in each month averaging over the term of the contract 5,700 tons. Sharon alternatively argued that any deviation from deliveries of 5,700 tons in each month was by a small amount and was immaterial.

The trial court explained this aspect of the 1974 dispute to the jury and instructed the jury, without objection then or now, that only a material departure from the requirements of a contract will constitute a breach. A.23a-24a. The court then asked the following questions and received the following answers:

5. Did Sharon agree to deliver to AMI no less than a minimum quantity of 5,700 tons of steel in each month during the term of the agreement for 1974?

   Yes X

   No ___

6. If your answer to Special Interrogatory 5 is "yes" did Sharon fail to comply with that term of the agreement for 1974?

   Yes ___

   No X

The jury thus found that Sharon was obliged to ship 5,700 tons of steel in each month and that it complied in material respects with this requirement.

Third, the parties disagreed concerning the price to be paid by AMI under the 1974 contract. AMI argued that the price was to be at or close to the price charged by major steel manufacturers. Sharon contended that the price was to be the same price as Sharon charged its customers generally. The trial court explained this dispute to the jury, asked the following question and received the following answer:

10. Did Sharon agree that the prices to be charged AMI under the agreement for 1974 were to be based on those established by the major mills, principally U.S. Steel?

    Yes ___

    No X

The AMI antitrust and tort claims rested in major part upon the breach of contract claims. The only damages sought by AMI at trial were such damages as it claimed resulted from failure to deliver steel in accordance with its view of the 1973 and 1974 contracts or from the alleged overpricing of steel delivered under the 1974 contract. AMI argued that Sharon's establishment and operation of a subsidiary that competed with AMI, together with certain alleged unfair actions, converted the simple breach of contract claims into antitrust and tort claims. In this connection, the trial court asked the jury the following interrogatories and received the following answers:

17. Did Sharon engage in a course of conduct specifically designed to injure AMI by interfering with its business relations with others?

Yes ___

No X

21. Do you find that Sharon combined or conspired with Ohio Metal Processing Company [Sharon's subsidiary] with the intent or for the purpose of eliminating or destroying AMI as a competitor of Ohio Metal Processing Company?

Yes ___

No X

22. Did Sharon enter into a combination or conspiracy with Ohio Metal Processing Company to injure competition and to unreasonably restrain trade or commerce?

Yes ___

No X

In accordance with the answers to these and other special interrogatories, the trial court entered judgment against AMI on its claims and in favor of Sharon on its counterclaim.

The trial court subsequently denied AMI's Motion For New Trial and Motion to Alter or Amend the Judgment, saying:

> I believe the case was thoroughly and carefully tried on the issues presented. As thoroughly as I know how, I have not discovered any erroneous influences that I can find which would warrant the retrial of these complicated issues.

Tr. of Hearing on May 9, 1978, at 77.

On appeal to the Third Circuit Court of Appeals, the judgment and the trial court's denial of the post-trial motions were affirmed. The Third Circuit's opinion had two separate foundations.

Realizing that this case turned entirely upon its facts and not upon contested issues of law, the Third Circuit first examined the trial court charge in the context of the 22 special interrogatories. It found that the key interrogatories to the jury were straightforward and strictly factual questions not requiring an elaborate charge to be understood. The court concluded that the charge as to the interrogatories fully satisfied the requirement of Rule 49(a) that the jury have "such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue." Fed.R.Civ.P. 49(a).

Although this conclusion would have been dispositive itself, the Third Circuit went on to decide that AMI had not demonstrated reversible error by the district court in refusing to give 75 of AMI's particular requested points for charge. As to two points that AMI properly preserved, the Third Circuit found that the trial court had not abused its discretion. As to the numerous other points not properly preserved by AMI, the Third Circuit concluded there had been no fundamental error.

The Court of Appeals also concluded that the jury's answers to interrogatories were consistent with each other and were supported by the evidence.

The Third Circuit denied AMI's petition for rehearing on November 28, 1978. A.7a.

REASONS FOR DENYING THE WRIT

I. & II. In View Of The Specific Factual Questions Put To The Jury, The Trial Court's Charge Is Well Within The Accepted And Usual Course Of Judicial Proceedings, Raises No Important Question Of Federal Law And Provides No Special And Important Reason Justifying Review By This Court.

Arguments I and II in AMI's Petition For Writ Of Certiorari cover the same point: "[T]he instructions to the jury were incomplete, insufficiently detailed, confusing, erroneous and misleading so as to require reversal." Petition at 6 and 12. Arguments I and II merely seek to support this overall claim by referring to different episodes from the charge. Part I refers, out of context, to the trial court's use of the term "monopoly". Part II refers to a confused portion of the charge concerning the 1973 contract, without citing the trial court's unmistakeably clear correction of this confusion.

More important than the frailty, treated more fully below, of these particular episodes is that the dispositive interrogatories were highly detailed. Not all the interrogatories were so detailed, but the dispositive ones—those relating to the 1974 contract—were.

This Court has stated that it will not grant a writ of certiorari where the issues in dispute affect only the parties or where the questions presented for review are abstractions that will not affect the outcome of the case. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

Because of the detailed findings of the jury, this case raises only the question whether the charge as to

the 1974 interrogatories "enable[d] the jury to make its findings on each issue." Fed.R.Civ.P. 49(a). AMI does not seek review of this question, since it affects only these parties and is not of substantial federal importance. Because of the specific findings of fact, particularly concerning the 1974 contract, the issues AMI does raise are only abstractions not appropriate for this Court's consideration.

It is difficult to imagine questions more detailed than those relating to the 1974 contract:

4. Answer this only if your answer to Interrogatory 2 is No. Did the parties intend that full performance of the agreement for 1974 would replace and cancel all obligations of the parties under the agreement for 1973?

   Yes X
   No ___

5. Did Sharon agree to deliver to AMI no less than a minimum quantity of 5,700 tons of steel in each month during the term of the agreement for 1974?

   Yes X
   No ___

6. If your answer to Special Interrogatory 5 is "yes" did Sharon fail to comply with that term of the agreement for 1974?

   Yes ___
   No X

10. Did Sharon agree that the prices to be charged AMI under the agreement for 1974 were to be

based on those established by the major mills, principally U.S. Steel?

Yes ___

No X

Interrogatories 4, 5 and 10 are strict fact questions that require no complex instructions to be understood. The jury needed only to understand the proper burden of proof and that an agreement may exist not only by express statement but also by a promise or commitment conveyed by word, conduct or silent acquiescence. The court charged without objection, at trial or now, on these points. A.18a-19a and 24a.

Interrogatory 6 asks the jury to put the strictly factual determinations in interrogatory 5 together with the essentially uncontested facts concerning the amount and time of actual shipments in 1974. The only issue for the jury on interrogatory 6 was whether there was a material variance between the facts concerning the amount and time of shipments and Sharon's promises as found in answering interrogatory 5.

AMI insisted at trial that the question of materiality be covered in the charge, rather than specifically in an interrogatory, as requested by Sharon. A. 44a. As counsel for AMI stated to the trial judge, "I think that the law is that it is understood that a breach has to be a material breach. . . ." *Id.* The trial judge concurred and instructed the jury in detail on the materiality point. A.23a-24a.

In addition to his general instructions on burden of proof, the elements of an enforceable agreement and materiality, the trial judge described the interrogatories briefly and simply. A.20a-22a.

To have given further instructions on any other point with respect to contract liability in 1974 would have been confusing surplusage. Although one might feel that a charge could have been better organized or more elegantly stated, a trial court has broad discretion in framing the charge. *Harris v. United States,* 367 F.2d 633 (1st Cir. 1966), *cert. denied,* 386 U.S. 915 (1967). Where special interrogatories are used, the basic inquiry is always whether the instructions contained what was necessary to resolution of the questions put to the jury and whether the instructions were phrased so as to be understood by the common man. Fed.R.Civ.P. 49(a); *Reyes v. Wyeth Laboratories,* 498 F.2d 1264, 1289, 1291 (5th Cir.), *cert. denied,* 419 U.S. 1096 (1974). By this standard, the trial court's charge was well within its discretion and was fully adequate to guide the jury's deliberations on interrogatories as detailed as numbers 4, 5, 6 and 10.

The jury's findings as to the 1974 contract preclude a finding of liability against Sharon on any other phase of AMI's claim.

As to the 1973 claim, the jury's specific findings that full performance of the 1974 contract would excuse further obligations under the 1973 contract and that Sharon did not breach the 1974 contract preclude any liability on the earlier contract.

Absent a breach of contract there could also be no liability on the antitrust and tort claims stated by AMI. The only damages claimed by AMI were those measured by alleged short shipments or overpricing under the contracts. Without proof of damages, antitrust and tort claims cannot stand. As final but not necessary nails in the coffin of the antitrust and tort claims, the jury made

specific determinations about Sharon's conduct toward AMI:

> 17. Did Sharon engage in a course of conduct specifically designed to injure AMI by interfering with its business relations with others?
>
> Yes ___
>
> No X
>
> 21. Do you find that Sharon combined or conspired with Ohio Metal Processing Company with the intent or for the purpose of eliminating or destroying AMI as a competitor and to unreasonably restrain trade or commerce?
>
> Yes ___
>
> No X

Given all this, it would not have been possible for the jury to find that Sharon had "enter[ed] into a combination or conspiracy with Ohio Metal Processing Company to injure competition and to unreasonably restrain trade or commerce." Special Interrogatory 22, A.12a. Yet AMI selects a small part of the trial court's antitrust charge as the first episode supporting its claim that the entire charge was inadequate.

Specifically, AMI takes issue with the fact that the trial court, in discussing Special Interrogatory No. 21, alluded to monopoly.[2] A.29a. This issue was never raised

2. AMI also complains about the trial court's refusal to charge the jury on three theories of per se antitrust liability. The trial court rejected these as unsupported by the evidence. The Third Circuit found no fundamental error in that rejection. The Third Circuit also found all of the jury's findings to be supported by the evidence. There is thus no record here upon which to resolve issues of per se antitrust liability.

in the trial court. After giving the charge about which AMI now complains, the trial court held a conference in chambers and specifically asked that counsel "make any request they wish or . . . take exceptions to the charge so that it might be corrected before the jury begins their actual deliberations." A.54a. AMI made other objections at that time but said nothing about the reference to monopoly. Nor did AMI make this point to the trial court in its motion for new trial.

AMI's failure to raise this point in the trial court not only precludes reliance on it now, Fed.R.Civ.P. 51, but also supports the conclusion that in any event there was no error in the reference to monopoly. Surely, if there really were so gross an error as AMI claims, its experienced counsel would have objected strenuously. AMI's silence is itself a demonstration that the references to monopoly, taken in context, did not result in an erroneous charge to the jury.

The trial court advised the jury that any unreasonable restraint of trade or injury to competition would be adequate under Section 1 of the Sherman Act, 15 U.S.C. §1, to support antitrust liability, A.31a:

> Remembering the purpose of the antitrust laws, that is, to preserve competition, if you should find by a preponderance of the evidence that Sharon and Ohio Metal Processing engaged in a course of conduct or entered into a combination or conspiracy to impose restraint on the free movement of trade, in other words, simply to affect competition, we'll say, to remove competition to its full extent, from a relevant market area, and [then] an affirmative to this question is warranted.

AMI points to the language "to remove competition to its full extent" as an instruction that a restraint of trade must be such as would eliminate competition entirely or result in a monopoly. In context with the other phrases, however, such as "to impose restraint on the free movement of trade" and "simply to affect competition", the phrase "to remove competition to its full extent" meant "to render competition less than full." Viewed in context, this instruction told the jury that it should find an unreasonable restraint of trade if Sharon's conduct prevented competition from operating "to its full extent."

AMI points also to the trial court's earlier specific use of the term "monopoly." A.29a. However, this reference to monopoly was merely part of the transition from discussion of the contract claims to discussion of the antitrust claim. Considered together with the rest of the charge and with the language of the special interrogatories, there was no error in the mention of monopoly.

The second episode relied upon by AMI is an admittedly confusing description by the trial court of Sharon's contention concerning the delivery schedule under the 1973 contract. Petition for Writ of Certiorari at 12-13. At Sharon's request, the trial court corrected this confusion, A.35a:

> I may have misrepresented a contention of Sharon Steel, however, with respect to the time and quantity of deliveries during 1973. I believe I stated that it was Sharon's contention that or that it was Sharon's contention that the arrangement for 1973 had to do only with a total volume to be delivered during the term of the contract. This is not Sharon Steel's contention. It is Sharon Steel's contention that they did not agree to delivery of any specific quantities of steel. In 1973, there was to be a continuation of the previously adopted arrangement and steel would be delivered as available on what had been referred to in the testimony as a flywheel basis. This is a contention of Sharon and not that they had agreed to an overall quantity.

From all of the foregoing discussion, it is clear that, contrary to AMI's argument, the Third Circuit's result does not depend upon slavish adherence to *Lawrence v. Gulf Oil Corp.*, 375 F.2d 427 (3d Cir. 1967), and is not contrary to rulings of other circuits. *Lawrence* does not sanctify every use of special interrogatories. It requires that each case be examined in detail to determine whether the charge together with any special interrogatories properly placed the issues before the jury. Moreover, the uniform approach of the circuits is to determine the adequacy of a charge through examination of the particular facts and circumstances of a case. This is just what the Third Circuit did in rejecting AMI's challenge to the trial court's charge.

The charge here adequately explained a series of straightforward, determinative factual interrogatories; the jury answered these interrogatories in favor of Sharon; and the District Court and the Third Circuit both found that the jury's answers were supported by the evidence. The conduct of the trial court and of the Third Circuit thus was well within "the accepted and usual course of judicial proceedings." Sup. Ct. R. 19. Since these facts raise no special or important question of federal law, this Court should allow the case to rest upon the clearly expressed and dispositive findings of the jury.

III. The Third Circuit's Conclusion That AMI Waived Most Of Its Objections To The Trial Court's Jury Instructions Is Fully In Accord With The Law In Other Circuits And Is, In Any Event, Not Necessary To Support The Third Circuit's Decision.

In considering challenges to jury instructions, the circuits have consistently enforced the requirement of Fed. R. Civ. P. 51 that:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

In *Palmer v. Hoffman,* 318 U.S. 109, 118 (1943), this Court explained the reason for this rule:

> In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial.

The rule thus has two purposes: (1) to make abundantly clear each party's position and (2) to give the trial court a full opportunity to correct any errors.

Neither of these purposes had been achieved at the time AMI made the general exception upon which it now relies. AMI had filed more than 100 requested points for charge. Those requests, however, were filed before trial. They did not take account of unanticipated developments during the lengthy trial or of the special interrogatories

formulated in conference between the trial court and counsel at the close of the evidence. Moreover, there was never a discussion with the court concerning these pretrial requested points for charge.

On the day before the charge, the trial court denied all the pretrial suggested points for charge and advised counsel that he would ask them after his charge, and while the jury was at lunch, to submit any additional requests or objections. A.52a. He did just that.

After the initial charge and while the jury was at lunch, counsel for Sharon proposed that both parties be granted exceptions as to those points for charge which had been submitted before trial and which were not given by the court. A.52a-53a. Both the court and counsel for AMI immediately responded adversely to this suggestion, A.53a:

> *The Court:* I would like the opportunity to correct any errors or—
>
> *Mr. Schmidt [Counsel for AMI]:* I don't know if that's possible under Rule 51.
>
> Rule 51 really says you can't mousetrap the court.
>
> * * *
>
> *Mr. Schmidt:* And really what you have to do is tell the Court now—and I don't mean you. I'm speaking you impersonally—if any of us think that the Court has made any mistakes that we are going to rely on later, that the time to mention it is now, and give the Court an opportunity to reconsider it.
>
> First of all, I don't think that's in keeping with the spirit of Rule 51.
>
> And secondly, even if we did it, I'm not sure that it would be valid under the rule, because we're sup-

posed to tell the Court now what we think so the Court can consider it.

The trial judge then expressly invited "counsel to make any request they wish or to take exceptions to the charge so that it might be corrected before the jury begins their actual deliberations." A.54a. In response to the court's request, counsel for AMI made several specific objections to the charge. A.54a-58a. At least one of AMI's objections resulted in an additional instruction by the trial judge. A.35a-36a.

After discussion of these various points, counsel for Sharon asked, "You have completed yours?" A.59a. Counsel for AMI responded, "Yes." *Id.* AMI thus plainly indicated that it had made all the points it considered to be important.

Following the discussion of Sharon's specific objections to the charge, counsel for Sharon stated: "We take an exception to the Court's denial of all the requests for points of charge." A.70a. Counsel for AMI at this point injected, "We do the same as to ours, Your Honor." *Id.*

AMI's contention apparently is that some circuits would have ruled that such a general exception is adequate to preserve some 75 distinct objections to the charge. No circuit, however, countenances the sort of general exception relied upon by AMI, especially where, after the charge, the trial judge invites the parties to object specifically to anything in the charge. *Copperweld Steel Co. v. Demag-Mannesman-Bohler,* 578 F.2d 953, 960 (3d Cir. 1978); *United States v. Hollinger,* 553 F.2d 535, 542 (7th Cir. 1977) ("Of course, if the trial judges in this circuit prefer to do so, they are empowered to require the voicing of objections after the charge is given.")

AMI attempts to place itself within an exception to Rule 51 that "[t]he failure to object [pursuant to Rule 51] may be disregarded if the party's position has previously been clearly made to the court and it is plain that a further objection would be unavailing." Wright & Miller, *Federal Practice & Procedure* § 2553 at 639-40 (1971).[3]

All the circuits, including the Third Circuit, follow this "pointless formality" rule where the facts warrant its application. *United States v. General Motors Corp.,* 226 F.2d 745 (3d Cir. 1955). *See also, French v. United States,* 487 F.2d 1246, 1247 n.1 (1st Cir. 1973); *Steinhauser v. Hertz Corp.,* 421 F.2d 1169 (2d Cir. 1970); *Buckley v. Valley Camp Coal Co.,* 324 F.2d 244 (4th Cir. 1963); *Industrial Development Bd. of Town of Section, Ala. v. Fuqua Industries, Inc.,* 523 F.2d 1226 (5th Cir. 1975); *Batesole v. Stratford,* 505 F.2d 804 (6th Cir. 1974); *Mays v. Dealers Transit, Inc.,* 441 F.2d 1344 (7th Cir. 1971); *Meitz v. Garrison,* 413 F.2d 895 (8th Cir. 1969); *Union Pacific R. Co. v. Owens,* 142 F.2d 145 (9th Cir. 1944); *Dunn v. St. Louis-San Francisco Co.,* 370 F.2d 681, 684 (10th Cir. 1966); *Stewart v. Ford Motor Co.,* 553 F.2d 130 (D.C. Cir. 1977).

In this case, however, AMI's so called 75 objections to the charge were never expressed, and the trial judge had no opportunity to correct whatever errors AMI meant to cover in its general exception.

The principal case relied upon by AMI, *Gradsky v. Sperry Rand Corp.,* 489 F.2d 502 (6th Cir. 1973), is par-

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3. *Stewart v. Ford Motor Co.,* 553 F.2d 130 (D.C. Cir. 1977), after quoting the exception from Wright & Miller, states: "The authors, however, correctly note that the better practice is to renew the objection at the close of the charge." 553 F.2d at 140 n.11.

ticularly instructive in this regard. The court there notes that, in addition to 50 proposed instructions, the appellant filed 96 written objections to the other party's proposed instructions. The Sixth Circuit also states that "[a]fter an exhaustive review, including three informal conferences in chambers where the proposed charges were reviewed and discussed, the trial court charged the jury." 489 F.2d at 503.

The other pointless formality cases cited by AMI similarly rest upon facts demonstrating that the two purposes of Rule 51 had been satisfied. And one of those cases comments that the exception to Rule 51 is "often stated but rarely applied." *Batesole v. Stratford,* 505 F.2d 804, 808 (6th Cir. 1974).

In the present case, AMI, while submitting numerous requested points for charge before the start of trial, filed no objections to any of the points submitted by Sharon. More importantly, while there were several in-chambers discussions concerning the form and content of the special interrogatories, there was virtually no discussion of the pretrial requested points for charge, and certainly not the "exhaustive review" referred to in *Gradsky.*

Plainly, it would not have been a pointless formality for AMI to assert specific objections in response to the trial court's request. Counsel for AMI actually objected to several aspects of the charge, and an additional charge was given on one point as a result of those objections.

AMI has not established, nor could it, that the circuits are in conflict in the treatment of general exceptions to a charge, where the two purposes of Rule 51 have not been satisfied and where the trial court specifically asked for all objections. Accordingly, on the record here, the question on which AMI seeks review is purely

"academic." Review should be denied. *Rice v. Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 74 (1955).

There is one final reason why certiorari should not be granted on the third question presented by AMI. The decision of the Court of Appeals did not depend upon its finding that AMI had waived most of its objections to the charge. The Court of Appeals' decision rests principally upon a determination that, in view of the 22 special interrogatories, the trial court's charge was proper under the standard of Rule 49(a). A.3a. Where there is an alternative ground for the decision below, this Court has ruled that a writ of certiorari will not be granted. *The Monrosa v. Carbon Black Export, Inc.,* 359 U.S. 180 (1959).

CONCLUSION

For the foregoing reasons, AMI's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Appendix J

THURSDAY, DECEMBER 22, 1977

PITTSBURGH, PENNSYLVANIA

BEFORE: Honorable Herbert P. Sorg, J.

APPEARANCES:

For the Plaintiff:

ROSE, SCHMIDT AND DIXON
By: HAROLD R. SCHMIDT, ESQUIRE
H. YALE GUTNICK, ESQUIRE

TANNENBAUM, DUBIN & ROBINSON
By: MARVIN S. ROBINSON, ESQUIRE
MICHAEL JAY KLOSK, ESQUIRE

For the Defendant:

REED, SMITH, SHAW & MCCLAY
By: RICHARD T. WENTLEY, ESQUIRE
DANIEL BOOKER, ESQUIRE
MAYNARD MOORE, ESQUIRE

TRANSCRIPT OF OFFICIAL NOTES OF TESTIMONY OF AN IN CHAMBERS DISCUSSION IN THE ABOVE-CAPTIONED CASE TAKEN BY:

Michael D. Powers
Sandra D. Wenger
Official Court Reporters

at 9:40 a.m. and 2:20 p.m.

PROCEEDINGS

(Thereupon, court reconvened on Thursday, December 22, 1977 at 9:40 o'clock a.m.)

Mr. Booker: Interrogatory 7 and 12 relate to the materiality of any breach sustained, any breach by American Industries. The relevance of that, Your Honor, is that Section 612 of the Uniform Commercial Code, which deals with installment contracts, which we have in this case, provides that whenever a nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract, there is a breach of the whole. And we think it is necessary, for the record to be complete, for the jury to decide whether, for example, if there were short shipments in June and July of 1974, whether that was a material breach, such that it impaired the value of the whole contract.

And we are using the word "material" to convey this meaning of whether or not it impaired the value of the whole contract, such as to justify repudiation of the contract.

Mr. Gutnick: Your Honor, our position would be that the concept of material breach is merely an element of the cause of action, just as a contract requires an offer, acceptance, consideration, just as an antitrust unreasonable restatement requires certain elements to be proved and this merely is an element, and it bogs down the whole concept of special interrogatories.

If you had to give to the jury a special interrogatory on each element on each cause of action, we would probably have 30 more pages, and what this does is iso-

late one of the elements to try to have the jury's concentration focused on it, and perhaps move them away from the critical questions which have to be answered here.

It's a matter that, as I indicated in my covering letter, it's a matter which is appropriate for the charge to the jury, but not a special interrogatory to the jury.

And we've numbered and framed these in such a way that if these two are eliminated, we merely put them in there to have a complete set before Your Honor.

They were not covered last night and no one mentioned them last night.

But Mr. Booker called me after we reviewed these yesterday evening, or actually this morning, in the early hours, and I agreed to put it in here just so Your Honor could see them and make an appropriate ruling this morning. But we vigorously insist that it's an appropriate matter for Your Honor's charge, as opposed to a special interrogatory.

Mr. Schmidt: Your Honor, may I add this? I said I wasn't going to say anthing because I didn't want to forget anything that I was learning last night in preparation for the final argument. But I think that the law is that it's understood that a breach has to be a material breach, and this is something that would be properly covered in instructions to the jury as to determining whether there is a breach or not.

To pick out two separate areas and use the term "material" and breach for those, would seem to place greater emphasis than the law would place upon it and thus I think would be prejudicial.

Mr. Booker: The two areas to which it relates are the two areas as to which the plaintiff claims there has been a breach.

And we are dealing with the Uniform Commercial Code, which specifically says in dealing with installment contracts, that where there is a variation from what the contract calls for in any particular installment of shipments, that that justifies repudiation of the entire contract and constitutes a breach of the entire contract only if it substantially impairs the value of the whole.

I submit if the jury were to say that Sharon had failed to comply with the shipment terms, that the record would not be complete, and we would not have a finding of fact on the further question which is necessary to decide liability under Section 612 of the Code, on whether that breach went to the value of the entire contract.

The Court: And that's what you defined as materialized?

Mr. Booker: Yes. I was trying to come up with a term that would get at that point. I'd be willing to use the statutory terms, but I think that "material" covers it. And maybe it's a little easier to understand.

Mr. Gutnick: Your Honor, again, this is merely an undue emphasis on an element of the cause of action without mentioning any of the other elements of the cause of action, and it focuses the jury's mind on one aspect of the cause of action which seems to me is prejudicial.

If it is covered in Your Honor's charge, then it's part of the case, and there is no need for it to be a special interrogatory.

I don't even think it's the proper subject of a special interrogatory.

The Court: Isn't the entire subject matter included in Interrogatory 13 and probably 9 then?

Mr. Gutnick: Your Honor, we think it is. It would be included in both 6—Interrogatory No. 6 and Interrogatory No. 11.

Mr. Schmidt: We really think it shouldn't be included in any of them, but it would be appropriate for the Court to instruct the jury that if any breach has to be a material breach, and define what a material breach is in the charge, rather than focus on that one point in any of the interrogatories. That would be our position, Your Honor.

Mr. Gutnick: It's covered by 11 where they talk about failure to comply.

Mr. Schmidt: Yes. All right. But I—

Mr. Booker: If the jury feels, Your Honor, that there have been damages, and answers the question that AMI did sustain damages as a result, I don't think that answers the statutory question which is: Did it substantially impair, whatever those damages were? Did that substantially impair the value of the whole contract?

That's really the point that we're trying to get at.

Mr. Schmidt: Well, it's really—the unfair part of it is that the short shipments, plus the rising prices, create something entirely different than just a short shipment situation.

Mr. Booker: Well, Your Honor, the plaintiff suggested separating out short shipments and price into two interrogatories, and so that's already done.

I mean, if you want to go back to one interrogatory—

Mr. Schmidt: Well, the reason I think you have to separate them out—but the point of it is that you—I think it's appropriate to argue either way, that on the short shipments—but it is my intention to argue that short shipments, plus the higher price create a situation affecting the contract, because under the Sharon interpretation, they could lump it all in at the end on the average basis and you would have, when there is a falling market—and they say Friedman anticipated it. It would be interesting to see how that's handled. Friedman anticipated it. You are going to lump all the deliveries to him at some future time when the prices are higher and the market is falling, and that has something to do with the value of the contract.

At least I intend to argue that and Mr. Wentley will hear it, and you will, so I might as well tell you now.

See, you can't separate out short shipments alone. I think it's misleading to the jury. It's a question of argument and it's a question for the charge of the Court, would be our position, Your Honor.

I was thinking this up last night while Mr. Gutnick was over here working on the interrogatories. But that's my theory.

Mr. Booker: We are not separating out anything, Judge, that isn't separated out on it by the request of the plaintiffs.

Mr. Gutnick: Your Honor, we agreed last night that Interrogatories 7 and 11, in their present form, were the interrogatories to be submitted to the jury. This request

wasn't made last night. Seven and eleven covers that concept.

What they are trying to do now is isolate out one term, or element of a cause of action, and I think that's highly prejudicial.

Mr. Schmidt: We are trying to delineate just what type of breach, in the event a breach has been found, so when you look at this later, if that should become necessary, you are going to have to know, and we suspect that you would not have the information you would need unless the type of breach is actually defined by the answers which the jury gives.

The Court: You mean as to shipments?

Mr. Wentley: As opposed to a technical unimportant type of breach, which could have critical legal—

The Court: If AMI sustains damages as a result of a breach? What more is required to make it material?

Mr. Booker: Your Honor, the statute requires that the default with respect to a particular installment substantially impair the value of the entire contract.

Now if the jury answers the question on damages and decides to give damages only in relating to June and July, for example, and say those damages amount to 30 or $40,000, maybe they did suffer those damages, but that doesn't answer the question as to those two installments. But that doesn't answer the question whether, as to the entire contract, the value of the contract had been substantially impaired.

So that they should be entitled to damages for the entire contract.

Mr. Robinson: Well, Mr. Booker, paragraph seven, Special Interrogatory 7, in no way, says is a material breach in the obligation of June. It says a material breach of the agreement. And that essentially is what that particular section of the Uniform Commercial Code is saying.

Now what you would really like is to completely define it down to each and every element and embody into this interrogatory the words of the statute, in which case we might add a couple of case languages, and then we don't have the special interrogatories any more. We have the legal argument you are going to submit to the jury.

Mr. Gutnick: If the jury is instructed on this issue, that takes care of the whole matter.

The Court: What is the request for instruction concerning a matter of material?

Mr. Booker: No. 7, Your Honor. And No. 7 and No. 12.

Mr. Gutnick: I think he's asking for the charge—

Mr. Schmidt: You submitted a request for charge on the—

Mr. Booker: I'm sorry, Your Honor. I don't have a copy of our request. It's in my briefcase.

Will you excuse me a moment, Your Honor?

The Court: All right.

Mr. Booker: It's our No. 17, Your Honor. If you find that there was no substantial impairment of the entire contract to the plaintiff in August, 1974, then you must find that plaintiff's repudiation of the contract, at that time, was a breach of the 1974 agreement.

Mr. Gutnick: Your Honor, we've submitted an instruction on this point likewise. It is our No. 27. It goes as follows: You are instructed, as a matter of law, that if a party's nonperformance of part of a contract has resulted in a substantial impairment of the value of the contract, it makes absolutely no difference if he performed all of his other obligations completely, and it makes absolutely no difference if prior breaches of contract had been forgiven or waived by the party who was injured.

If you find that any of the terms of the price, quantities or ton of delivery were important to plaintiff, and that defendant either failed to honor or appeared as if it would not honor any of those terms, then you are instructed to find that defendant's actions substantially impaired the value of the contract.

The Court: And, therefore?

Mr. Gutnick: Well, then we go on sequentially. Therefore, we're entitled to recover if there is no—

The Court: If the defendant substantially impaired the value of the contract by his breaches of the agreement?

Mr. Gutnick: Yes. The terms of the agreement, yes.

The Court: Then AMI was justified in terminating it?

Mr. Gutnick: Yes.

The Court: That's what you mean to say. Therefore, there was no breach by AMI. This is what you mean to say?

Mr. Gutnick: We say—of course, we say there was —yes. No breach by AMI.

Mr. Schmidt: But there was a breach by Sharon.

Mr. Gutnick: Right.

The Court: All right. Now where is the interrogatory with respect to the breach by AMI?

Mr. Booker: No. 15.

Mr. Schmidt: I think those are 15 and 16.

Mr. Gutnick: Yes. 15 and 16, and they don't have—they have the language we agreed upon last night.

The Court: It's the plaintiff's position that if an instruction concerning the subject matter covered in 7 and 12 would be given in connection with 15, that you would have an implied answer to 7 and 12, which would not require a specific submission?

Mr. Gutnick: That's correct, Your Honor. If the instruction is given with respect to all of them, then it would not require a specific submission to the jury, and we would go along with that.

The Court: Then this calls for a definition of what failure to comply encompasses with respect to Interrogatory 15?

Mr. Gutnick: That would be correct.

The Court: You realize we're going to ask this jury to answer 24 interrogatories?

All right. I do think that the subject matter should be treated under the question of AMI's breach of a contract. That if any breach by Sharon was a material breach, that there would be justification for termination of the contract which would not constitute a failure to comply.

This is what you are saying, that you are establishing your justification, or you are meeting the issue of

justification in another with respect to the question of whether there was a breach.

Mr. Wentley: We're also saying with regard to our conduct that any breach which they find we committed would have to be material. That's the thrust of our request.

The Court: Well, I think this is a question for argument and will be answered by the interrogatory which relates to the amount of damages sustained.

Mr. Gutnick: That means we eliminate 7 and 12 from this, Your Honor?

The Court: In that order. But not the subject matter. The subject matter is pertinent to 15.

Mr. Booker: In that event, Your Honor, I think that we ought to treat it in instructions and leave the interrogatories without 7 and 12.

The Court: All right.

* * * * *

(Thereupon, court reconvened in chambers on Thursday, December 22, 1977 at 2:20 o'clock p.m.)

The Court: I believe, as suggested yesterday, we thought we would dismiss the jury for lunch, and then invite counsel to make any comments they wish or submit any requests or objections.

Do counsel have any requests?

Mr. Wentley: As usual, I have a proposal that probably won't fly.

But I was going to suggest, Your Honor, that in view of the nature of the special interrogatories, and in view of the Court's previous statements, that it will be

reviewing the legal questions, I would think that if both the plaintiff and the defendant were granted exceptions to those points previously submitted in writing, which was not covered in the charge, that that can be all reviewed at a later time and everybody protected, as would the Court.

There may be something wrong with the idea, but I can't think of it.

The Court: I would like the opportunity to correct any errors or—

Mr. Schmidt: I don't know if that's possible under Rule 51.

Rule 51 really says you can't mousetrap the Court.

Mr. Wentley: No, sir, I'm not.

Mr. Schmidt: And really what you have to do is tell the Court now—and I don't mean you. I'm speaking you impersonally—if any of us think that the Court has made any mistake that we are going to rely on later, that the time to mention it is now, and give the Court an opportunity to reconsider it.

First of all, I don't think that's in keeping with the spirit of Rule 51.

And, secondly, even if we did it, I'm not sure that it would be valid under the rule, because we're supposed to tell the Court now what we think so the Court can consider it.

And I think that's the purpose of the Judge's question here.

Mr. Wentley: I respectfully disagree. We submitted written points. Those were our requests.

The Court: Well, I have denied the requests as stated to the extent that they have not been granted in substance.

Mr. Booker: And we note an exception.

The Court: If there is any fundamental error which was previously objected to, I don't think the lack of an objection in that respect would do it, but I'm now inviting counsel to make any request they wish or to take exceptions to the charge so that it might be corrected before the jury begins their actual deliberations.

Mr. Gutnick: Your Honor, we would respectfully request that Your Honor give a charge with respect to the non-compartmentalization of evidence, especially as it relates to the conspiracy and Section one case.

We had a proposed charge to that effect.

The Court: Non-compartmentalization of what?

Mr. Schmidt: I think the courts have said, Your Honor, that in conspiracy cases, and especially in antitrust conspiracies, you don't look at each element of the situation separately, but you don't compartmentalize it. But you look at the whole issue altogether.

Mr. Gutnick: The charge we suggested, Your Honor, was our suggested No. 18, under antitrust, and it states in cases such as this the plaintiff should be given the full benefit of its proof without tightly compartmentalizing the various factual components and wiping the slate clean as scrutiny of each. The nature, character and effects of a combination or conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

And in a case like the one before you, the duty of the jury is to look at the whole picture and not merely at the individual parts.

That charge was given in the Continental Ore case suggested by the Supreme Court, 370 US 690 1962, and the Third Circuit adopted it in Pitchford vs. Pepi, 531 Federal Second, 92, which cert. was denied.

The Court: Have I suggested that it was necessary to show such agreement?

Mr. Wentley: Well, you have said that they are to review all of the evidence in the entire matter with respect to each of the issues.

The Court: Whether they combined or conspired?

Mr. Wentley: Yes, Sir. But you have told them that they must review all of the evidence, and I think, Your Honor, that that is a short form of saying in all of this language—

Mr. Gutnick: Your Honor, I think Your Honor's instructions on that point, I think, was general, and perhaps appropriate if the case was purely a contract case.

Since it is not that, and because this is a charge exclusively appropriate to antitrust cases and cases involving conspiracies, combinations, where it is very difficult to prove that the parties sat down and you have to use a whole series of circumstantial events to bring the whole picture together, I thing it's an appropriate charge and one that's been certainly adopted by the Supreme Court.

Mr. Gutnick: We have nothing further to add, Your Honor.

The Court: I will deny that request, I think, in view if the instruction at this time.

Mr. Gutnick: I would just note an exeception.

The Court: Noted to the issue that it would be prejudicial?

Mr. Gutnick: We would note an exception on the record, please.

Your Honor, with respect to the contract claims, we had a proposed charge relating to the UCC concept of good faith and commercial reasonableness, if I can locate that for you as we suggested it.

The Court: Which, of course, I did not give in haec verba because I didn't have it before me.

Mr. Gutnick: It was our Suggested No. 21, Your Honor, under Contracts and it reads, "It is the essence of the law of contracts that people should act with the utmost of good faith."

Now, when merchants, that is people who deal in goods of the same kind, have made a contract together, this concept of good faith means not only that they are to act in total honesty with one another, but they shall also act in accordance with the reasonable commercial standards of fair dealing in the trade, specifically here in the steel industry. This language is directly from Sections 2103 and 2104 of the Uniform Commercial Code. And since this is a case involving the Uniform Commercial Code, we thought that would be an appropriate instruction.

The Court: And in such an instance, wouldn't then there be evidence of standards?

Mr. Gutnick: Standards of good faith?

The Court: Yes.

Mr. Gutnick: Well, I think, as I read the proposed instruction, Your Honor, I think that it does imply a standard that there be total honesty with one another and commercial reasonableness.

The Court: I believe that has been charged in substance.

Mr. Gutnick: I take it then Your Honor is denying—

The Court: Denied as stated.

Mr. Gutnick: Noted exception to that.

Your Honor, I wasn't quite sure in my own mind whether or not there was a charge on circumstantial evidence. I didn't recall anything specifically and, so, I would just request that if it hasn't already been done, I don't think it has, at least I don't recall that it has, that there be a general instruction given on circumstantial evidence.

The Court: There was none. The question is whether it is necessary or appropriate.

Mr. Gutnick: Well, we would take the position that it would be appropriate, Your Honor, especially in view—

The Court: What instruction do you request?

Mr. Gutnick: Okay.

The Court: Evidence may be of two kinds, direct and circumstantial.

Mr. Gutnick: That is the one, Your Honor.

The Court: Then end up by saying it may make no difference what kind of evidence it is? I am not sure that circumstantial evidence isn't often more reliable than direct evidence.

Mr. Gutnick: Yes. We proposed an instruction of that kind in No. 6 under General Instructions and No. 7.

Maybe Mr. Wentley would want the same instruction, I am not sure.

The Court: Well, I only find that I get into difficulty when I characterize evidence as to avoid giving the impression that one kind of evidence is better than another kind of evidence.

Mr. Wentley: Can we go off the record for just a moment?

(Whereupon, an off the record discussion was had.)

Mr. Gutnick: There is no objection to it.

The Court: No objection to what?

Mr. Gutnick: To my request for a circumstantial evidence charge.

The Court: All right.

Mr. Gutnick: We also think it is particularly appropriate here that Your Honor give an instruction concerning the concept or idea of duplication of damages so as the jury, by virtue of the special questions, is not—does not exercise restraint from answering yes or putting in an amount of damages in situations where they feel there may be a duplication. I would think that an instruction from Your Honor to the effect that the jury should not concern itself about duplicative damages, but that this is something that the Court can determine later.

The Court: I had intended to give such a charge, that there may appear to be damages for the—for the same injury, they should consider any amounts that they are calculating with respect to the particular issue they

are considering. I just didn't, but, all right. What does counsel for the defendant say?

Mr. Wentley: You have completed yours?

Mr. Gutnick: Yes.

Mr. Booker: I have a few points on the instructions that were given, Your Honor, and then I guess we can talk about additional ones.

The Court: All right.

Mr. Booker: In discussing or describing to the jury the plaintiff's or Sharon's claims with respect to the 1973 agreement, Your Honor, I believe you characterized Sharon's position as the position for 1973 that the shipments could be made on the basis of an average, but over the period of the contract, the 1973 contract. Respectfully, Your Honor, that is not our position with respect to the 1973 agreement.

Our position there is that the 1973 agreement, with respect to deliveries, was consistent with the prior year's arrangements between the parties which was that shipments would be made on—on a basis of an as-available production space basis and not that they would be made within any particular year. We think that ought to be corrected.

The Court: I don't recall that I did fail to distinguish between Sharon's alleged commitments, which was for 1973 and 1974. I believe I stated that there was a dispute as to the time and quantity of delivery for 1973, it being the plaintiff's position that there was a commitment for the delivery of minimum of regular, minimum monthly quantities and that it was the defendant's contention that they were committed to the delivery of the total amount over the entire period, only

then is this the equivalent of average monthly shipments.

In other words, do I understand Sharon's postion to be other than if—if they had withheld delivery until October and then delivered five-sixths of the total quantity, that it would not have been in compliance with the arrangement? The delivery of the 60,000 tons in December is the equivalent to the delivery of an average of 5,000 tons per month?

Mr. Booker: No, Your Honor, this is not our position with respect to the 1973 agreement.

The Court: How can it be different from that?

Mr. Booker: Our position with respect to the 1974 agreement is that we had a commitment to supply steel, substantial amounts, and that the supplies would average 6,000 tons a month. That is accurate with respect to the contract for 1974.

But with respect to the contract for 1973, Your Honor, our claim is that this was to use our terms because there, the ones that we're familiar with, that this was a flywheel arrangement.

The Court: Right.

Mr. Booker: That Sharon was committed to make shipment of the tonnages at the flywheel prices, but that there was no agreement as to time, not even within the one-year period of the contract. That is the respect in which we believe you—

The Court: That's right, then I did misrepresent your contention. Do I interpret it to mean that you didn't commit yourselves to deliver any quantities at all during the year other than on a flywheel basis?

Mr. Booker: That's correct, Your Honor.

Mr. Gutnick: Your Honor, with respect to the 1973 agreement, Your Honor also mentioned that there was a dispute not only as to the shipping schedules, but also as to price and I believe, at least it is my understanding, that there is no dispute as to price under the agreement for 1973. And if Your Honor is correcting that, you might also—we would respectfully suggest that Your Honor would indicate that.

The Court: I was very careful to avoid any issue as to price in 1973.

Mr. Gutnick: I don't recall this—

Mr. Robinson: With all due respect, I do believe inadvertently you did mention that at one part, but at the latter part, the conclusion of your remarks, with respect to the 1973 agreement, you did not so state it. But it did appear, I think you will find that the record will indicate, that it does appear in your initial outline because you probably were concentrating on the other years' contract.

The Court: I was fully aware of it and intended to avoid any reference to a price issue with respect to 1973.

Mr. Gutnick: I think Your Honor might have fallen into the same problem as we did when we referred to Ohio Metals sometimes as Ohio Industries or something like that. We—you get confused and I think, perhaps, it just inadvertently crept into the thing.

Mr. Robinson: It is very possible, Your Honor, that I am in error about the years as well, but I do think that I had noted that at the time.

The Court: All right. You think it ought to be corrected?

Mr. Gutnick: Well, consistent with the correction you're going to make on their position on the 1973 agreement. You might suggest or advise the jury that in the event that you did indicate that there was a mention of price, that they should disregard it. There is no dispute as to price.

The Court: All right.

Mr. Booker: Next point, Your Honor, in going through the interrogatories, it struck me that we might have left some language out and that the jury, perhaps, ought to be directed that they need not answer Special Interrogatory No. 4 as relating to cancellation based on full performance if they answer "Yes" to Interrogatory No. 2, which is based on that absolute cancellation.

The Court: Oh, yes. You think it is prejudicial to have them answer both questions?

Mr. Booker: I think we end up then with inconsistent fact-finding.

The Court: Unless they answered them consistently.

Mr. Gutnick: We would be certainly willing to strike 4. It really is unnecessary if they—whatever they answer 2—2 or 3, whatever, it could be determinative of this issue.

Mr. Booker: Your Honor, I think—well, I think the easiest way around it is simply to say if you—to say answer Interrogatory 4 only if you answer Interrogatory 2 and then no.

Mr. Wentley: It would be appropriate once, if you decide to so reinstruct, to give them substitute pages.

The Court: Do what?

Mr. Wentley: To give them a substitute page or to—I know that it is a hard thing to remember in an oral charge to go back upstairs and then note for certain what he said on 4, and I would suggest a substitute page be distributed to the jury.

The Court: What have counsel agreed to with respect to the interrogatory?

Mr. Robinson: We have not agreed, Your Honor. We suggest that it is academic and it should be stricken since there's no purpose to the interrogatory as such. Interrogatory No. 2 raises the issue that is in contention and, therefore, it is not necessary for Interrogatory No. 4.

The Court: Counsel for the defendant indicates additional language, the necessary effect of which would be the same, that you only answer it in the event of a negative answer to Interrogatory No. 2.

Mr. Booker: I thought we were beyond this point, Your Honor. We talked about this and decided that this was going in last night. I am just saying that questions as phrased do present the possibility which could easily be eliminated of inconsistent answers.

The Court: Well, isn't it on the—do we need a substitute page? Isn't it, as a matter of fact, suggested in it after the interrogatory that the answer to that only be given if there is a negative answer to 2?

Mr. Booker: No, that is not in there and that is what I am suggesting not to be in there, Your Honor.

Mr. Gutnick: Your Honor, I think it is very clear from 2 to answer 2 one way or the other. You definitely don't need 4.

The Court: Unless there is a subsequent interrogatory that Sharon didn't breach the 1974 agreement as to delivery.

Mr. Booker: Right. It is really just a mechanical point, Your Honor, that I just think maybe we ought to have a new page typed up that says—adds that language at the beginning, if your answer to No. 2 was no, and then—or answer this only if your answer to No. 2 was no.

Mr. Wentley: No. 2 and 4 are quite different.

Mr. Gutnick: We'll agree with that, Your Honor.

The Court: John, have a substitute page made up starting the page, "Answer this only if your answer to."

Mr. Wentley: Putting that on 4, not Interrogatory 2?

Mr. Gutnick: Correct.

Mr. Booker: Yes.

The Court: "Answer this interrogatory only if your answer to Question No. 2 is 'Yes.' "

"Or is 'No.' "

Mr Wentley: "No."

Mr. Gutnick: "No."

Mr. Booker: Your Honor referred to Interrogatory or Special Interrogatories 7 and 12 as not being submitted. Were those pages in the pages that the jury received?

The Court: I don't know that.

Mr. Gutnick: Your law clerk told me they were not.

Mr. Booker: I am sorry.

The Court: All right. If they were, we would have a problem with that.

(Whereupon, an off the record discussion was had.)

Mr. Booker: For the record, Your Honor, we note an exception to the charge relating to—from which Your Honor referred, I think without citing, to the Restatement of torts, Section 766, which we think does not—

The Court: 766, what was it?

Mr. Booker: I don't recall the subsection.

The Court: I don't think a Court should ever give instructions to the jury without having them written up and reading them verbatim, but I just didn't have time with this one, that's all. I am not proud of it, but I hope it is covered, the issues are covered, that's all.

Mr. Booker: I beg your indulgence, Your Honor.

The Court: That's all right.

John went to have that page made?

Mr. Gutnick: I believe he did, Your Honor.

Mr. Booker: Yes, he did.

Your Honor, we would request that the jury should be instructed concerning the requirement of mitigation of damages, which, as I recall, there has been no instruction on. This would relate to our proposed Instructions 38, 39 and 40, which three instructions concern the obligation to mitigate direct damages and the requirement precedent to recovery of lost profits that the plaintiff or the party claiming damages must demon-

strate that he could not have avoided the consequential damages by the purchase of substitute products or otherwise.

We think that the testimony of Dr. Kuehn, as Your Honor may recall, specifically said he didn't take account of any facts relating to mitigation of damages. This is an affirmative requirement for the recovery of consequential damages and suggested should be submitted to the jury.

Mr. Gutnick: Your Honor, we would agree that a general charge applicable to both parties on mitigation would be appropriate with one caveat, and that is under the antitrust laws there is no obligation to mitigate damages. I think we run into some problems if it is not carefully phrased.

The Court: Are you sure you want the jury instructed on the issue on damages at this time?

Mr. Wentley: The answer to your question is no, I am not sure.

No, we made the request and I think we have to pursue it, Your Honor.

Mr. Booker: And with respect to the antitrust claims, Your Honor, our Instruction No. 70, which is directly taken from the ABA Proposed Instructions or Practice and Instructions under the Antitrust Laws, does concern the ability or the requirement that a party can sit idly by for damages.

The Court: I can't find your requests, that doesn't mean I haven't looked at them.

Mr. Wentley: We have—have an extra copy here, Your Honor.

Mr. Booker: On the contract issues, Your Honor, it would be Nos. 38, 39 and 40.

The Court: This is not what was agreed to by the plaintiff, I don't think.

Yours was an agreement to a general charge on mitigation of damages?

Mr. Gutnick: That is correct, Your Honor. We don't—

The Court: You have Defendant's Requests No. 38?

Mr. Gutnick: Don't have it in front of me. Can I see yours, Dan?

(Whereupon, an off the record discussion was had.)

Mr. Gutnick: We would agree to a general charge on mitigation of damages, but not a charge that argues the defendant's case.

The Court: Nos. 38, 39 and 40 are denied as stated at this point.

Did you have any alternative requests?

Mr. Booker: Well, perhaps we can do something with our No. 70, Your Honor. I believe that even though this first line here refers to antitrust laws, I think if we took out the word "antitrust," this is generally the law applicable to mitigation of damages.

Mr. Wentley: Start with the second sentence, "If plaintiff fails to mitigate, then—."

Mr. Gutnick: "In this case, if the party fails—"

The Court: "If either party fails," then to define mitigate.

Mr. Wentley: Could I be excused for just a minute, Your Honor?

(Whereupon, a recess was had.)

(Thereupon, court reconvened in chambers at 3:35 o'clock p.m.)

Mr. Booker: Your Honor, I understand that you have denied our request for charge on the mitigation of damages. That's our charges 38, 39, 40 and 70.

And we take exception to that, Your Honor.

Let the record show that in light of your ruling, the counsel have agreed upon a different form of charge, which I understand will be given.

Secondly, Your Honor, we request, in line with Sharon's proposed charge, No. 71, that the Court instruct the jury that in an antitrust case, damages are trebled and that such trebling is to be done by the Court and not by the jury.

Mr. Schmidt: We object.

Mr. Gutnick: We would object to that along the line of the Pennsylvania cases rising out of the district and Circuit, that treble is improper for the jury to be apprised of. It's prejudicial.

The Court: What case is it?

Mr. Gutnick: I can cite you to the Stewart vs. Piper Aircraft in the Middle District of Pennsylvania, Your Honor, where extensive briefs were written on that subject.

There is also a reported opinion there.

The Court: Mr. Booker, are you familiar with the case?

Mr. Booker: No, I'm not, Your Honor. We rely, Your Honor, on the ABA Proposed Instructions at page 202 and 203, and on the instructions as reported in Gray vs. Ford Motor at 355 Fed. Sup. at page—

The Court: 355 F. Sup., Vince. What page?

Mr. Booker: 878, Your Honor.

The Court: Judge Knox simply states that he did and why he did it. Does the Court of Appeals have any comment on it?

Mr. Booker: My citation to the case shows that it was reversed on other grounds, which we would not have done without checking to be sure that that was right.

Mr. Gutnick: Your Honor, the statute provides that the trebling is to be done by the Court, and the question now is whether or not the Court should advise the jury of what it is going to do.

We think that would be highly prejudicial, and I think the majority of the Circuits disfavor any kind of notification to the jury to that effect.

The Court: Judge Knox says he took the charge from Devitt & Blackmar.

Mr. Booker: I haven't checked that, Your Honor. But, as I noted, it's one of the ABA suggested instructions.

The Court: We do have here a special interrogatory asking the jury to assess the damages, the losses sustained as a result of an antitrust violation.

I have no reason to believe that a jury is aware that treble damages are applied to antitrust actions.

Mr. Schmidt: I think the Court has explained it is purely compensatory.

The Court: All right. We better—I will deny the request to instruct on the issue of treble damages.

Mr. Booker: We note an exception, Your Honor.

Finally, Your Honor has noted he has denied the request for charge of the defendant as submitted in the pretrial, our requests for charge in nearly every instance, accompanied by our citations to the authorities and which gives the basis for the proposed request for charge and in each instance relying on the authorities that we cite there. We take an exception to the Court's denial of all the requests for points of charge.

Mr. Schmidt: We do the same as to ours, Your Honor.

The Court: All right.

Mr. Gutnick: Your Honor, I—I guess the one matter I just want to make sure of, that I am clear on this is the instruction of duplication of damages. Were you going to clarify that with the jury?

The Court: Well, I think it is easy to concede, is it not, that the parties who sustained the losses are entitled to damages only once?

Mr. Gutnick: That's right, Your Honor. That is duplicated, but, nevertheless, that they arrived at the question of damages and in response to the questions they are not to be concerned about the fact that they may be awarded damages for the same injury.

Mr. Booker: There is one other final point with regard to the exhibits that are shown to the jury. One of those exhibits is the 1976 annual report of Sharon which contains matters which have been discussed with the Court previously which we believe are irrelevant and we submit that that particular exhibit should not be sent to the jury.

Mr. Gutnick: We agree with that, Your Honor.

Mr. Schmidt: We agree with that, Your Honor.

The Court: All right.

Get the jury down.

(Whereupon, the in chambers conference was concluded and the following proceedings were held in open court.)